UNITED STATES REPORTS

VOLUME 509

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1992

JUNE 18 THROUGH OCTOBER 1, 1993

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

183 U. S. 589, line 4: "1802" should be "1902".
199 U. S. 119, line 16: "1895" should be "1905".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.[2]
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.[3]

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

JANET RENO, ATTORNEY GENERAL.
DREW S. DAYS III, SOLICITOR GENERAL.[1]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
SHELLEY L. DOWLING, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] Solicitor General Drew S. Days III, was presented to the Court on June 21, 1993. See *post*, p. VII.

[2] JUSTICE WHITE announced his retirement on March 19, 1993, effective "at the time the Court next rises for its summer recess." See *post*, p. IX.

[3] The Honorable Ruth Bader Ginsburg, of New York, formerly a Judge of the United States Court of Appeals for the District of Columbia Circuit, was nominated by President Clinton on June 14, 1993, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 3, 1993; she was commissioned on August 5, 1993; and she took the oaths and her seat on August 10, 1993. She was presented to the Court on October 1, 1993. See *post*, p. XIII.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.*

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. VI, and 501 U. S., p. V.)

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*For order of June 28, 1993, assigning JUSTICE THOMAS to the Tenth Circuit, see *post*, p. 934.

SUPREME COURT OF THE UNITED STATES

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For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 1, 1993.

(For next previous allotment, and modifications, see 502 U. S., p. VI, and *ante*, p. V.)

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 21, 1993

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE THOMAS.

THE CHIEF JUSTICE said:

The Court at this time wishes to note for the record that William C. Bryson has been serving as Acting Solicitor General since January past. The Court recognizes the considerable responsibility that has been placed upon you, Mr. Bryson, to represent the government of the United States before this Court. On behalf of my colleagues, I thank you for a job well done and you have our sincere appreciation.

The Court now recognizes the Attorney General, General Reno.

Attorney General Reno said:

MR. CHIEF JUSTICE and may it please the Court, I have the honor to present to the Court the Solicitor General of the United States, The Honorable Drew S. Days, III, of Connecticut.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this

Court. You follow in the footsteps of other outstanding attorneys who have held your new office. Your commission will be duly recorded by the Clerk.

Solicitor General Days said:

Thank you, MR. CHIEF JUSTICE.

RETIREMENT OF JUSTICE WHITE

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 28, 1993

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE THOMAS.

THE CHIEF JUSTICE said:

As most of you know, our esteeemed colleague, Justice White, is retiring from this bench and his colleagues have sent him this letter on this occasion which I will now read.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., June 23, 1993.

Dear Byron:

Your decision to retire from the Court has brought to each of us a profound sense of sadness. You came here more than thirty-one years ago, and have played a pivotal part in the deliberations and decisions of this institution with three different Chief Justices during the administration of eight different Presidents.

You brought to the Court a reputation for excellence in many fields—scholar-athlete, combat intelligence officer in the South Pacific during World War II, successful private lawyer, Deputy Attorney General. Your long service here has greatly enhanced that reputation, as you have exhibited

a firm resolve not to be classified in any one doctrinal pigeonhole. The important opinions which you have authored for the Court in virtually every field of law with which we deal will remain as a testament to your years of service here.

Every cloud, they say, has a silver lining; for us the silver lining to your retirement is that you leave in good health, and plan to remain here in the Washington area, at least for the time being. You will be missed at our Conferences, but we will continue to enjoy your friendship which means so much to each of us.

Affectionately,

WILLIAM H. REHNQUIST
HARRY A. BLACKMUN
JOHN PAUL STEVENS
SANDRA DAY O'CONNOR
ANTONIN SCALIA
ANTHONY M. KENNEDY
DAVID H. SOUTER
CLARENCE THOMAS

JUSTICE WHITE replied as follows:

SUPREME COURT OF THE UNITED STATES
CHAMBERS OF JUSTICE BYRON R. WHITE *(Retired)*,
Washington, D. C., June 28, 1993.

Dear Colleagues,

I am grateful for your very generous letter on the occasion of my retirement, which is now upon me. There is no doubt that I shall miss the Court very much, primarily because I shall no longer have the pleasure and excitement of working in a small group of nine Justices, all of whom day after day and year after year are together dealing with the same issues and cases in an attempt to arrive at satisfactory decisions. I have sat with 20 Justices in my time here and have had great respect for the ability and integrity of each of them. I have treasured their friendship. Of course, Jus-

tices differ with one another on all sorts of issues, but we have not held grudges and have gotten along remarkably well. That is how it should be.

This Court is a very small organization for the freight it carries, and its work is made possible only by the competent and dedicated service of those who work here. I shall always be grateful to all of them for their willing, friendly and reliable help down through the years.

Since I remain a federal judge and will likely sit on Courts of Appeals from time to time, it will be necessary for me to follow the Court's work. No longer will I be able to agree with or dissent from a Court's opinion. Hence, like any other Court of Appeals judge, I hope the Court's mandates will be clear, crisp, and leave those of us below with as little room as possible for disagreement about their meaning.

The Court is a great institution, and I wish it well. It has been good to me.

Cheers,

BYRON

APPOINTMENT OF JUSTICE GINSBURG

SUPREME COURT OF THE UNITED STATES

FRIDAY, OCTOBER 1, 1993

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG.

The Marshal said:

All Rise, the President of the United States.

THE CHIEF JUSTICE said:

On behalf of the Court, Mr. President, I extend to you a warm welcome. This special sitting of the Court is held today to receive the commission of the newly appointed Associate Justice of the Supreme Court of the United States, Ruth Bader Ginsburg. The Court now recognizes the Attorney General of the United States, Ms. Janet Reno.

The Attorney General said:

MR. CHIEF JUSTICE and may it please the Court, I have the commission which has been issued to the Honorable Ruth Bader Ginsburg as an Associate Justice of the Supreme Court of the United States. The commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Ms. Reno, your motion is granted. Mr. Clerk, will you please read the commission?

The Clerk read the commission:

WILLIAM JEFFERSON CLINTON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To All Who Shall See These Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the wisdom, uprightness, and learning of Ruth Bader Ginsburg, of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint her an Associate Justice of the Supreme Court of the United States and do authorize and empower her to execute and fulfill the duties of that office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Her, the said Ruth Bader Ginsburg, during her good behavior.

In Testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this fifth day of August, in the year of our Lord one thousand nine hundred and ninety-three, and of the Independence of the United States of America the two hundred and eighteenth.

[SEAL] WILLIAM JEFFERSON CLINTON

By the President:

JANET RENO,

Attorney General

THE CHIEF JUSTICE said:

I now ask the Chief Deputy Clerk of the Court to escort Justice Ginsburg to the bench.

THE CHIEF JUSTICE said:

Justice Ginsburg, are you ready to take the oath?

Justice Ginsburg said:

I am.

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Ginsburg said:

I, Ruth Bader Ginsburg, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States under the Constitution and Laws of the United States, so help me God.

RUTH BADER GINSBURG

Subscribed and sworn to before me this first day of October, 1993.

WILLIAM H. REHNQUIST
Chief Justice

THE CHIEF JUSTICE said:

JUSTICE GINSBURG, on behalf of all the members of the Court, it is a pleasure to extend to you a very warm welcome as an Associate Justice of the Court and to wish for you a long and happy career in our common calling.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1992

ZOBREST ET AL. *v.* CATALINA FOOTHILLS SCHOOL DISTRICT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–94. Argued February 24, 1993—Decided June 18, 1993

Petitioners, a deaf child and his parents, filed this suit after respondent school district refused to provide a sign-language interpreter to accompany the child to classes at a Roman Catholic high school. They alleged that the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Clause of the First Amendment required respondent to provide the interpreter and that the Establishment Clause did not bar such relief. The District Court granted respondent summary judgment on the ground that the interpreter would act as a conduit for the child's religious inculcation, thereby promoting his religious development at government expense in violation of the Establishment Clause. The Court of Appeals affirmed.

Held:

1. The prudential rule of avoiding constitutional questions if there is a nonconstitutional ground for decision is inapplicable here, since respondent did not urge upon the District Court or the Court of Appeals any of the nonconstitutional grounds it now raises in this Court. Pp. 6–8.

2. The Establishment Clause does not prevent respondent from furnishing a disabled child enrolled in a sectarian school with a sign-language interpreter in order to facilitate his education. Government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also

Syllabus

receive an attenuated financial benefit. *Mueller* v. *Allen*, 463 U. S. 388; *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481. The same reasoning used in *Mueller* and *Witters* applies here. The service in this case is part of a general government program that distributes benefits neutrally to any child qualifying as disabled under the IDEA, without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of individual parents' private decisions. Since the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. The fact that a public employee will be physically present in a sectarian school does not by itself make this the same type of aid that was disapproved in *Meek* v. *Pittenger*, 421 U. S. 349, and *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373. In those cases, the challenged programs gave direct grants of government aid—instructional equipment and material, teachers, and guidance counselors—which relieved sectarian schools of costs they otherwise would have borne in educating their students. Here, the child is the primary beneficiary, and the school receives only an incidental benefit. In addition, an interpreter, unlike a teacher or guidance counselor, neither adds to nor subtracts from the sectarian school's environment but merely interprets whatever material is presented to the class as a whole. There is no absolute bar to the placing of a public employee in a sectarian school. Pp. 8–14.

963 F. 2d 1190, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which STEVENS and O'CONNOR, JJ., joined as to Part I, *post*, p. 14. O'CONNOR, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 24.

William Bentley Ball argued the cause for petitioners. With him on the briefs was *Thomas J. Berning*.

Acting Solicitor General Bryson argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Ronald J. Mann, Jeffrey C. Martin*, and *Susan Craig*.

John C. Richardson argued the cause for respondent. With him on the brief was *Gary F. Urman.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Zobrest, who has been deaf since birth, asked respondent school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school in Tucson, Arizona, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.*, and its Arizona counterpart, Ariz. Rev. Stat. Ann. § 15–761 *et seq.* (1991 and Supp. 1992). The United States Court of Appeals for the Ninth Circuit decided, however, that provision of such a publicly employed interpreter would violate the Establishment Clause of the First Amendment. We hold that the Establishment Clause does not bar the school district from providing the requested interpreter.

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*Briefs of *amici curiae* urging reversal were filed for the Alexander Graham Bell Association for the Deaf by *Bonnie P. Tucker;* for the American Jewish Congress et al. by *Marc D. Stern, Lois C. Waldman, Oliver S. Thomas,* and *J. Brent Walker;* for the Christian Legal Society et al. by *Michael W. McConnell, Steven T. McFarland,* and *Bradley P. Jacob;* for the Deaf Community Center, Inc., by *Jay Alan Sekulow, James M. Henderson, Sr., Mark N. Troobnick, Jordan W. Lorence, Keith A. Fournier, John G. Stepanovich, Thomas Patrick Monaghan,* and *Walter M. Weber;* for the United States Catholic Conference by *Mark E. Chopko, John A. Liekweg,* and *Phillip H. Harris;* for the Institute for Justice by *William H. Mellor III* and *Clint Bolick;* and for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Bradley S. Phillips, Steven R. Shapiro, John A. Powell, Steven K. Green, Steven M. Freeman,* and *Samuel Rabinove;* for the Arizona School Boards Association, Inc., by *Robert J. DuComb, Jr.;* for the Council on Religious Freedom by *Lee Boothby, Robert W. Nixon, Walter E. Carson,* and *Rolland Truman;* for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon;* and for the National Committee for Public Education and Religious Liberty et al. by *David B. Isbell, T. Jeremy Gunn,* and *Elliot M. Mincberg.*

James Zobrest attended grades one through five in a school for the deaf, and grades six through eight in a public school operated by respondent. While he attended public school, respondent furnished him with a sign-language interpreter. For religious reasons, James' parents (also petitioners here) enrolled him for the ninth grade in Salpointe Catholic High School, a sectarian institution.[1] When petitioners requested that respondent supply James with an interpreter at Salpointe, respondent referred the matter to the county attorney, who concluded that providing an interpreter on the school's premises would violate the United States Constitution. App. 10–18. Pursuant to Ariz. Rev. Stat. Ann. § 15–253(B) (1991), the question next was referred to the Arizona attorney general, who concurred in the county attorney's opinion. App. to Pet. for Cert. A–137. Respondent accordingly declined to provide the requested interpreter.

Petitioners then instituted this action in the United States District Court for the District of Arizona under 20 U. S. C. § 1415(e)(4)(A), which grants the district courts jurisdiction over disputes regarding the services due disabled children under the IDEA.[2] Petitioners asserted that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide James with an interpreter at Salpointe, and that the Establishment Clause does not bar such relief. The complaint sought a preliminary injunction and "such other and further relief as the Court deems just and proper." App. 25.[3] The District Court denied petitioners'

[1] The parties have stipulated: "The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe." App. 92.

[2] The parties agreed that exhaustion of administrative remedies would be futile here. *Id.*, at 94–95.

[3] During the pendency of this litigation, James completed his high school studies and graduated from Salpointe on May 16, 1992. This case nonetheless presents a continuing controversy, since petitioners seek reimbursement for the cost they incurred in hiring their own interpreter, more than $7,000 per year. *Id.*, at 65.

request for a preliminary injunction, finding that the provision of an interpreter at Salpointe would likely offend the Establishment Clause. *Id.*, at 52–53. The court thereafter granted respondent summary judgment, on the ground that "[t]he interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense." App. to Pet. for Cert. A–35. "That kind of entanglement of church and state," the District Court concluded, "is not allowed." *Ibid.*

The Court of Appeals affirmed by a divided vote, 963 F. 2d 1190 (CA9 1992), applying the three-part test announced in *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971). It first found that the IDEA has a clear secular purpose: "'to assist States and Localities to provide for the education of all handicapped children.'" 963 F. 2d, at 1193 (quoting 20 U. S. C. § 1400(c)).[4] Turning to the second prong of the *Lemon* inquiry, though, the Court of Appeals determined that the IDEA, if applied as petitioners proposed, would have the primary effect of advancing religion and thus would run afoul of the Establishment Clause. "By placing its employee in the sectarian school," the Court of Appeals reasoned, "the government would create the appearance that it was a 'joint sponsor' of the school's activities." 963 F. 2d, at 1194–1195. This, the court held, would create the "symbolic union of government and religion" found impermissible in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 392 (1985).[5] In contrast, the dissenting judge argued that "[g]eneral welfare programs neutrally available to all children," such as the IDEA, pass constitutional muster, "because their benefits diffuse over the entire population." 963 F. 2d, at 1199 (opinion of Tang,

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[4] Respondent now concedes that "the IDEA has an appropriate 'secular purpose.'" Brief for Respondent 16.

[5] The Court of Appeals also rejected petitioners' Free Exercise Clause claim. 963 F. 2d, at 1196–1197. Petitioners have not challenged that part of the decision below. Pet. for Cert. 10, n. 9.

J.). We granted certiorari, 506 U. S. 813 (1992), and now reverse.

Respondent has raised in its brief in opposition to certiorari and in isolated passages in its brief on the merits several issues unrelated to the Establishment Clause question.[6] Respondent first argues that 34 CFR § 76.532(a)(1) (1992), a regulation promulgated under the IDEA, precludes it from using federal funds to provide an interpreter to James at Salpointe. Brief in Opposition 13.[7] In the alternative, respondent claims that even if there is no affirmative bar to the relief, it is not *required* by statute or regulation to furnish interpreters to students at sectarian schools. Brief for Respondent 4, n. 4.[8] And respondent adds that providing such

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[6] Respondent may well have waived these other defenses. For in response to an interrogatory asking why it had refused to provide the requested service, respondent referred only to the putative Establishment Clause bar. App. 59–60.

[7] That regulation prohibits the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization." 34 CFR § 76.532(a)(1) (1992). The United States asserts that the regulation merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the Establishment Clause. Brief for United States as *Amicus Curiae* 23; see also Brief for United States as *Amicus Curiae* in *Witters* v. *Dept. of Services for Blind*, O. T. 1985, No. 84–1070, p. 21, n. 11 ("These regulations are based on the Department's interpretation of constitutional requirements"). This interpretation seems persuasive to us. The only authority cited by the Secretary for issuance of the regulation is his general rulemaking power. See 34 CFR § 76.532 (1992) (citing 20 U. S. C. §§ 1221e–3(a)(1), 2831(a), and 2974(b)). Though the Fourth Circuit placed a different interpretation on § 76.532 in *Goodall* v. *Stafford County School Board*, 930 F. 2d 363, 369 (holding that the regulation prohibits the provision of an interpreter to a student in a sectarian school), cert. denied, 502 U. S. 864 (1991), that court did not have the benefit of the United States' views.

[8] In our view, this belated contention is entitled to little, if any, weight here given respondent's repeated concession that, but for the perceived federal constitutional bar, it would have willingly provided James with an interpreter at Salpointe as a matter of local policy. See, *e. g.*, Tr. of Oral Arg. 31 ("We don't deny that . . . we would have voluntarily done

a service would offend Art. II, § 12, of the Arizona Constitution. Tr. of Oral Arg. 28.

It is a familiar principle of our jurisprudence that federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided. See, *e. g.*, *United States* v. *Locke*, 471 U. S. 84, 92 (1985), and cases cited therein. In *Locke*, a case coming here by appeal under 28 U. S. C. § 1252 (1982 ed.), we said that such an appeal "brings before this Court not merely the constitutional question decided below, but the entire case." 471 U. S., at 92. "The entire case," we explained, "includes nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court." *Ibid.* Therefore, in that case, we turned "first to the nonconstitutional questions pressed below." *Ibid.*

Here, in contrast to *Locke* and other cases applying the prudential rule of avoiding constitutional questions, only First Amendment questions were pressed in the Court of Appeals. In the opening paragraph of its opinion, the Court of Appeals noted that petitioners' appeal raised only First Amendment issues:

> "The Zobrests appeal the district court's ruling that provision of a state-paid sign language interpreter to James Zobrest while he attends a sectarian high school would violate the Establishment Clause. The Zobrests also argue that denial of such assistance violates the Free Exercise Clause." 963 F. 2d, at 1191.

Respondent did not urge any statutory grounds for affirmance upon the Court of Appeals, and thus the Court of Appeals decided only the federal constitutional claims raised by petitioners. In the District Court, too, the parties chose to

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that. The only concern that came up at the time was the Establishment Clause concern").

litigate the case on the federal constitutional issues alone. "Both parties' motions for summary judgment raised only federal constitutional issues." Brief for Respondent 4, n. 4. Accordingly, the District Court's order granting respondent summary judgment addressed only the Establishment Clause question. App. to Pet. for Cert. A–35.

Given this posture of the case, we think the prudential rule of avoiding constitutional questions has no application. The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule. See, *e. g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 572 (1987). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970). We therefore turn to the merits of the constitutional claim.

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen* v. *Kendrick*, 487 U. S. 589, 609 (1988). For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar* v. *Vincent*, 454 U. S. 263, 274–275 (1981) (internal quotation marks omitted). Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit. Nowhere have we stated this principle more clearly than in *Mueller* v. *Allen*, 463 U. S. 388 (1983), and *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481 (1986), two cases dealing specifically

with government programs offering general educational assistance.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota law allowing taxpayers to deduct certain educational expenses in computing their state income tax, even though the vast majority of those deductions (perhaps over 90%) went to parents whose children attended sectarian schools. See 463 U. S., at 401; *id.*, at 405 (Marshall, J., dissenting). Two factors, aside from States' traditionally broad taxing authority, informed our decision. See *Witters*, *supra*, at 491 (Powell, J., concurring) (discussing *Mueller*). We noted that the law "permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses." 463 U. S., at 398 (emphasis in original). See also *Widmar*, *supra*, at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion) (same). We also pointed out that under Minnesota's scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from our other cases involving "the direct transmission of assistance from the State to the schools themselves." 463 U. S., at 399.

Witters was premised on virtually identical reasoning. In that case, we upheld against an Establishment Clause challenge the State of Washington's extension of vocational assistance, as part of a general state program, to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. Looking at the statute as a whole, we observed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U. S., at 487. The program, we said, "creates no financial incentive for students

to undertake sectarian education." *Id.*, at 488. We also remarked that, much like the law in *Mueller*, "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" *Witters, supra*, at 487 (quoting *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 782–783, n. 38 (1973)). In light of these factors, we held that Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not advance religion in a manner inconsistent with the Establishment Clause. *Witters, supra*, at 489.

That same reasoning applies with equal force here. The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," *Witters, supra*, at 488, it follows under our prior decisions that provision of that service does not offend the Establishment Clause. See *Wolman* v. *Walter*, 433 U. S. 229, 244 (1977). Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child's tuition—and that is,

of course, assuming that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Respondent contends, however, that this case differs from *Mueller* and *Witters*, in that petitioners seek to have a public employee physically present in a sectarian school to assist in James' religious education. In light of this distinction, respondent argues that this case more closely resembles *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985). In *Meek*, we struck down a statute that, *inter alia*, provided "massive aid" to private schools—more than 75% of which were church related—through a direct loan of teaching material and equipment. 421 U. S., at 364–365. The material and equipment covered by the statute included maps, charts, and tape recorders. *Id.*, at 355. According to respondent, if the government could not place a tape recorder in a sectarian school in *Meek*, then it surely cannot place an interpreter in Salpointe. The statute in *Meek* also authorized state-paid personnel to furnish "auxiliary services"—which included remedial and accelerated instruction and guidance counseling—on the premises of religious schools. We determined that this part of the statute offended the First Amendment as well. *Id.*, at 372. *Ball* similarly involved two public programs that provided services on private school premises; there, public employees taught classes to students in private school classrooms.[9] 473 U. S., at 375. We found that those programs likewise violated the Constitution, relying largely on *Meek*. 473 U. S., at 386–389. According to respondent, if the government could not provide educational services on the premises of sectarian schools in *Meek* and *Ball*, then it surely cannot provide James with an interpreter on the premises of Salpointe.

[9] Forty of the forty-one private schools involved in *Ball* were pervasively sectarian. 473 U. S., at 384–385.

Respondent's reliance on *Meek* and *Ball* is misplaced for two reasons. First, the programs in *Meek* and *Ball*—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students. See *Witters*, 474 U. S., at 487 ("[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State") (quoting *Ball*, *supra*, at 394). For example, the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function. 421 U. S., at 365–366. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." *Id.*, at 366. So, too, was the case in *Ball:* The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U. S., at 397. "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." *Id.*, at 395. The extension of aid to petitioners, however, does not amount to "an impermissible 'direct subsidy'" of Salpointe, *Witters*, *supra*, at 487, for Salpointe is not relieved of an expense that it otherwise would have assumed in educating its students. And, as we noted above, any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to "the private choices of individual parents." *Mueller*, 463 U. S., at 400. Disabled children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries. Thus, the function of the IDEA is hardly "'to provide desired financial

support for nonpublic, sectarian institutions.'" *Witters, supra,* at 488 (quoting *Nyquist, supra,* at 783).

Second, the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. Notwithstanding the Court of Appeals' intimations to the contrary, see 963 F. 2d, at 1195, the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school.[10] Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance.[11] Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." App. 73. James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.

The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school,

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[10] For instance, in *Wolman* v. *Walter,* 433 U. S. 229, 242 (1977), we made clear that "the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion," even when those services are provided within sectarian schools. We accordingly rejected a First Amendment challenge to the State's providing diagnostic speech and hearing services on sectarian school premises. *Id.,* at 244; see also *Meek* v. *Pittenger,* 421 U. S. 349, 371, n. 21 (1975).

[11] Indeed, respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the interpreter themselves. Brief for Respondent 11 ("If such were the case, then the sign language interpreter would be the student's employee, not the School District's, and governmental involvement in the enterprise would end with the disbursement of funds").

we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, and with whom JUSTICE STEVENS and JUSTICE O'CONNOR join as to Part I, dissenting.

Today, the Court unnecessarily addresses an important constitutional issue, disregarding longstanding principles of constitutional adjudication. In so doing, the Court holds that placement in a parochial school classroom of a public employee whose duty consists of relaying religious messages does not violate the Establishment Clause of the First Amendment. I disagree both with the Court's decision to reach this question and with its disposition on the merits. I therefore dissent.

I

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501 (1985); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring); *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). This is a "fundamental rule of judicial restraint," *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984), which has received the sanction of time and experience. It has been described as a "corollary" to the Article III case or controversy requirement, see *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 570 (1947), and is grounded in basic

principles regarding the institution of judicial review and this Court's proper role in our federal system, *ibid.*

Respondent School District makes two arguments that could provide grounds for affirmance, rendering consideration of the constitutional question unnecessary. First, respondent maintains that the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.*, does not require it to furnish James Zobrest with an interpreter at any private school so long as special education services are made available at a public school. The United States endorses this interpretation of the statute, explaining that "the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option." Brief for United States as *Amicus Curiae* 13. And several courts have reached the same conclusion. See, *e. g.*, *Goodall* v. *Stafford County School Bd.*, 930 F. 2d 363 (CA4), cert. denied, 502 U. S. 864 (1991); *McNair* v. *Cardimone*, 676 F. Supp. 1361 (SD Ohio 1987), aff'd *sub nom. McNair* v. *Oak Hills Local School Dist.*, 872 F. 2d 153 (CA6 1989); *Work* v. *McKenzie*, 661 F. Supp. 225 (DC 1987). Second, respondent contends that 34 CFR § 76.532(a)(1) (1992), a regulation promulgated under the IDEA, which forbids the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization," prohibits provision of a sign-language interpreter at a sectarian school. The United States asserts that this regulation does not preclude the relief petitioners seek, Brief for United States as *Amicus Curiae* 23, but at least one federal court has concluded otherwise. See *Goodall*, *supra*. This Court could easily refrain from deciding the constitutional claim by vacating and remanding the case for consideration of the statutory and regulatory issues. Indeed, the majority's decision does not eliminate the need to resolve these remaining questions. For, regardless of the Court's views on the Establishment Clause, petitioners will not obtain what they seek if the federal stat-

ute does not require or the federal regulations prohibit provision of a sign-language interpreter in a sectarian school.[1]

The majority does not deny the existence of these alternative grounds, nor does it dispute the venerable principle that constitutional questions should be avoided when there are nonconstitutional grounds for a decision in the case. Instead, in its zeal to address the constitutional question, the majority casts aside this "time-honored canon of constitutional adjudication," *Spector Motor Service*, 323 U. S., at 105, with the cursory observation that "the prudential rule of avoiding constitutional questions has no application" in light of the "posture" of this case, *ante*, at 8. Because the parties chose not to litigate the federal statutory issues in the District Court and in the Court of Appeals, the majority blithely proceeds to the merits of their constitutional claim.

But the majority's statements are a non sequitur. From the rule against deciding issues not raised or considered below, it does not follow that the Court should consider constitutional issues needlessly. The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a "self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294 (1982). It is a rule whose aim is to protect not parties but the law and the adjudicatory process. Indeed, just a few days ago, we expressed concern that "litigants, by agreeing on the legal issue presented, [could] extract the opinion of a court

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[1] Respondent also argues that public provision of a sign-language interpreter would violate the Arizona Constitution. Article II, § 12, of the Arizona Constitution provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." The Arizona attorney general concluded that, under this provision, interpreter services could not be furnished to James. See App. 9.

on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 447 (1993). See *United States* v. *CIO*, 335 U. S. 106, 126 (1948) (Frankfurter, J., concurring).

That the federal statutory and regulatory issues have not been properly briefed or argued does not justify the Court's decision to reach the constitutional claim. The very posture of this case should have alerted the courts that the parties were seeking what amounts to an advisory opinion. After the Arizona attorney general concluded that provision of a sign-language interpreter would violate the Federal and State Constitutions, the parties bypassed the federal statutes and regulations and proceeded directly to litigate the constitutional issue. Under such circumstances, the weighty nonconstitutional questions that were left unresolved are hardly to be described as "buried in the record." *Ante*, at 8. When federal- and state-law questions similarly remained open in *Wheeler* v. *Barrera*, 417 U. S. 402 (1974), this Court refused to pass upon the scope or constitutionality of a federal statute that might have required publicly employed teachers to provide remedial instruction on the premises of sectarian schools. Prudence counsels that the Court follow a similar practice here by vacating and remanding this case for consideration of the nonconstitutional questions, rather than proceeding directly to the merits of the constitutional claim. See *Youakim* v. *Miller*, 425 U. S. 231 (1976) (vacating and remanding for consideration of statutory issues not presented to or considered by lower court); *Escambia County* v. *McMillan*, 466 U. S. 48, 51–52 (1984) (vacating and remanding for lower court to consider statutory issue parties had not briefed and Court of Appeals had not passed upon); *Edward J. DeBartolo Corp.* v. *NLRB*, 463 U. S. 147, 157–158 (1983) (vacating and remanding for consideration of statutory question).

II

Despite my disagreement with the majority's decision to reach the constitutional question, its arguments on the merits deserve a response. Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision.

Let us be clear about exactly what is going on here. The parties have stipulated to the following facts. James Zobrest requested the State to supply him with a sign-language interpreter at Salpointe High School, a private Roman Catholic school operated by the Carmelite Order of the Catholic Church. App. 90. Salpointe is a "pervasively religious" institution where "[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." *Id.*, at 92. Salpointe's overriding "objective" is to "instill a sense of Christian values." *Id.*, at 90. Its "distinguishing purpose" is "the inculcation in its students of the faith and morals of the Roman Catholic Church." Religion is a required subject at Salpointe, and Catholic students are "strongly encouraged" to attend daily Mass each morning. *Ibid.* Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular.[2] They are encouraged to do so by "assist[ing] students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum." *Id.*, at 92. The agreement also sets forth detailed rules of

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[2] The Faculty Employment Agreement provides: "'Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other.'" App. 90–91.

conduct teachers must follow in order to advance the school's Christian mission.[3]

At Salpointe, where the secular and the sectarian are "inextricably intertwined," governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion. A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance. Indeed, petitioners willingly concede this point: "That the interpreter conveys religious messages is a given in the case." Brief for Petitioners 22. By this concession, petitioners would seem to surrender their constitutional claim.

The majority attempts to elude the impact of the record by offering three reasons why this sort of aid to petitioners survives Establishment Clause scrutiny. First, the majority observes that provision of a sign-language interpreter

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[3] The Faculty Employment Agreement sets forth the following detailed rules of conduct:

"'1. Teacher shall at all times present a Christian image to the students by promoting and living the school philosophy stated herein, in the School's Faculty Handbook, the School Catalog and other published statements of this School. In this role the teacher shall support all aspects of the School from its religious programs to its academic and social functions. It is through these areas that a teacher administers to mind, body and spirit of the young men and women who attend Salpointe Catholic High School.

. . . . . .

"'3. The School believes that faithful adherence to its philosophical principles by its teachers is essential to the School's mission and purpose. Teachers will therefore be expected to assist in the implementation of the philosophical policies of the School, and to compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal.'" *Id.*, at 91.

occurs as "part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Ante*, at 10. Second, the majority finds significant the fact that aid is provided to pupils and their parents, rather than directly to sectarian schools. As a result, "'[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'" *Ante*, at 9, quoting *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481, 487 (1986). And, finally, the majority opines that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor." *Ante*, at 13.

But the majority's arguments are unavailing. As to the first two, even a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause. See *Bowen* v. *Kendrick*, 487 U. S. 589 (1988) (holding that Adolescent Family Life Act on its face did not violate the Establishment Clause, but remanding for examination of the constitutionality of particular applications). For example, a general program granting remedial assistance to disadvantaged schoolchildren attending public and private, secular and sectarian schools alike would clearly offend the Establishment Clause insofar as it authorized the provision of teachers. See *Aguilar* v. *Felton*, 473 U. S. 402, 410 (1985); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 385 (1985); *Meek* v. *Pittenger*, 421 U. S. 349, 371 (1975). Such a program would not be saved simply because it supplied teachers to secular as well as sectarian schools. Nor would the fact that teachers were furnished to pupils and their parents, rather than directly to sectarian schools, immunize such a program from Establishment Clause scrutiny. See *Witters*, 474 U. S., at 487 ("Aid may have [unconstitutional] effect even though it takes the form of aid to students

or parents"); *Wolman* v. *Walter*, 433 U. S. 229, 250 (1977) (it would "exalt form over substance if this distinction [between equipment loaned to the pupil or his parent and equipment loaned directly to the school] were found to justify a . . . different" result); *Ball*, 473 U. S., at 395 (rejecting "fiction that a . . . program could be saved by masking it as aid to individual students"). The majority's decision must turn, then, upon the distinction between a teacher and a sign-language interpreter.

"Although Establishment Clause jurisprudence is characterized by few absolutes," at a minimum "the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Id.*, at 385. See *Bowen* v. *Kendrick*, 487 U. S., at 623 (O'CONNOR, J., concurring) ("*[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause") (emphasis in original); *Meek*, 421 U. S., at 371 (" 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion,' " quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971)); *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472, 480 (1973) ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"). In keeping with this restriction, our cases consistently have rejected the provision by government of any resource capable of advancing a school's religious mission. Although the Court generally has permitted the provision of "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school," *Meek*, 421 U. S., at 364, it has always proscribed the provision of benefits that afford even the "opportunity for the transmission of sectarian views," *Wolman*, 433 U. S., at 244.

Thus, the Court has upheld the use of public school buses to transport children to and from school, *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), while striking down the

employment of publicly funded buses for field trips controlled by parochial school teachers, *Wolman*, 433 U. S., at 254. Similarly, the Court has permitted the provision of secular textbooks whose content is immutable and can be ascertained in advance, *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), while prohibiting the provision of any instructional materials or equipment that could be used to convey a religious message, such as slide projectors, tape recorders, record players, and the like, *Wolman*, 433 U. S., at 249. State-paid speech and hearing therapists have been allowed to administer diagnostic testing on the premises of parochial schools, *id.*, at 241–242, whereas state-paid remedial teachers and counselors have not been authorized to offer their services because of the risk that they may inculcate religious beliefs, *Meek*, 421 U. S., at 371.

These distinctions perhaps are somewhat fine, but "'lines must be drawn.'" *Ball*, 473 U. S., at 398 (citation omitted). And our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message. If petitioners receive the relief they seek, it is beyond question that a state-employed sign-language interpreter would serve as the conduit for James' religious education, thereby assisting Salpointe in its mission of religious indoctrination. But the Establishment Clause is violated when a sectarian school enlists "the machinery of the State to enforce a religious orthodoxy." *Lee* v. *Weisman*, 505 U. S. 577, 592 (1992).

Witters, *supra*, and *Mueller* v. *Allen*, 463 U. S. 388 (1983), are not to the contrary. Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax. This case, on the other hand, involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine. When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government

is actually endorsing religion. But the graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to "enlis[t]—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." *Ball*, 473 U. S., at 385. And the union of church and state in pursuit of a common enterprise is likely to place the *imprimatur* of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets.

Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause. As *amicus* Council on Religious Freedom points out, the provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct, as Salpointe has in this case. A traditional Hindu school would be likely to instruct its students and staff to dress modestly, avoiding any display of their bodies. And an orthodox Jewish yeshiva might well forbid all but kosher food upon its premises. To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy. For such reasons, it long has been feared that "a union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962). The Establishment Clause was designed to avert exactly this sort of conflict.

III

The Establishment Clause "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum* v. *Board of Ed. of*

School Dist. No. 71, Champaign Cty., 333 U. S. 203, 212 (1948). To this end, our cases have strived to "chart a course that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 672 (1970). I would not stray, as the Court does today, from the course set by nearly five decades of Establishment Clause jurisprudence. Accordingly, I dissent.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, dissenting.

I join Part I of JUSTICE BLACKMUN's dissent. In my view, the Court should vacate and remand this case for consideration of the various threshold problems, statutory and regulatory, that may moot the constitutional question urged upon us by the parties. "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984). That "fundamental rule" suffices to dispose of the case before us, whatever the proper answer to the decidedly hypothetical issue addressed by the Court. I therefore refrain from addressing it myself. See *Rust* v. *Sullivan*, 500 U. S. 173, 223–225 (1991) (O'CONNOR, J., dissenting).

Syllabus

HELLING ET AL. *v.* McKINNEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1958. Argued January 13, 1993—Decided June 18, 1993

Respondent McKinney, a Nevada state prisoner, filed suit against petitioner prison officials, claiming that his involuntary exposure to environmental tobacco smoke (ETS) from his cellmate's and other inmates' cigarettes posed an unreasonable risk to his health, thus subjecting him to cruel and unusual punishment in violation of the Eighth Amendment. A federal magistrate granted petitioners' motion for a directed verdict, but the Court of Appeals reversed in part, holding that McKinney should have been permitted to prove that his ETS exposure was sufficient to constitute an unreasonable danger to his future health. It reaffirmed its decision after this Court remanded for further consideration in light of *Wilson* v. *Seiter*, 501 U. S. 294, in which the Court held that Eighth Amendment claims arising from confinement conditions not formally imposed as a sentence for a crime require proof of a subjective component, and that where the claim alleges inhumane confinement conditions or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of *Estelle* v. *Gamble*, 429 U. S. 97. The Court of Appeals held that *Seiter*'s subjective component did not vitiate that court's determination that it would be cruel and unusual punishment to house a prisoner in an environment exposing him to ETS levels that pose an unreasonable risk of harming his health—the objective component of McKinney's claim.

Held:

1. It was not improper for the Court of Appeals to decide the question whether McKinney's claim could be based on possible future effects of ETS. From its examination of the record, the court was apparently of the view that the claimed entitlement to a smoke-free environment subsumed the claim that ETS exposure could endanger one's future, not just current, health. Pp. 30–31.

2. By alleging that petitioners have, with deliberate indifference, exposed him to ETS levels that pose an unreasonable risk to his future health, McKinney has stated an Eighth Amendment claim on which relief could be granted. An injunction cannot be denied to inmates who plainly prove an unsafe, life-threatening condition on the ground that nothing yet has happened to them. See *Hutto* v. *Finney*, 437 U. S. 678, 682. Thus, petitioners' central thesis that only deliberate indifference

Syllabus

to inmates' current serious health problems is actionable is rejected. Since the Court cannot at this juncture rule that McKinney cannot possibly prove an Eighth Amendment violation based on ETS exposure, it also would be premature to base a reversal on the Federal Government's argument that the harm from ETS exposure is speculative, with no risk sufficiently grave to implicate a serious medical need, and that the exposure is not contrary to current standards of decency. On remand, the District Court must give McKinney the opportunity to prove his allegations, which will require that he establish both the subjective and objective elements necessary to prove an Eighth Amendment violation. With respect to the objective factor, he may have difficulty showing that he is being exposed to unreasonably high ETS levels, since he has been moved to a new prison and no longer has a cellmate who smokes, and since a new state prison policy restricts smoking to certain areas and makes reasonable efforts to respect nonsmokers' wishes with regard to double bunking. He must also show that the risk of which he complains is not one that today's society chooses to tolerate. The subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which, as evidenced by the new smoking policy, may have changed considerably since the Court of Appeals' judgment. The inquiry into this factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration. Pp. 31–37.

959 F. 2d 853, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 37.

Frankie Sue Del Papa, Attorney General of Nevada, argued the cause for petitioners. With her on the briefs were *Brooke A. Nielsen*, Assistant Attorney General, *David F. Sarnowski*, Chief Deputy Attorney General, and *Anne B. Cathcart*, Deputy Attorney General.

Deputy Solicitor General Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Edwin S. Kneedler, William Kanter*, and *Peter R. Maier.*

Cornish F. Hitchcock argued the cause for respondent. With him on the brief was *Alan B. Morrison.**

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to decide whether the health risk posed by involuntary exposure of a prison inmate to environ-

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*A brief of *amici curiae* urging reversal was filed for the State of Hawaii et al. by *Warren Price III*, Attorney General of Hawaii, and *Steven S. Michaels*, Deputy Attorney General, *James Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Gale A. Norton*, Attorney General of Colorado, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Chris Gorman*, Attorney General of Kentucky, *Michael E. Carpenter*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Mike Moore*, Attorney General of Mississippi, *William Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *John P. Arnold*, Attorney General of New Hampshire, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Charles S. Crookham*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *Mark Barnett*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Paul Van Dam*, Attorney General of Utah, *Mary Sue Terry*, Attorney General of Virginia, *Mario J. Palumbo*, Attorney General of West Virginia, *James E. Doyle*, Attorney General of Wisconsin, *Joseph B. Meyer*, Attorney General of Wyoming, *John Payton*, Corporation Counsel of District of Columbia, and *Charles Reischel*, Deputy Corporation Counsel, *Jorge Perez-Diaz*, Attorney General of Puerto Rico, *Tautai A. F. Fa'alevao*, Attorney General of American Samoa, *Elizabeth Barrett-Anderson*, Attorney General of Guam, and *Rosalie Simmonds Ballentine*, Attorney General of the Virgin Islands.

John A. Powell, *Steven A. Shapiro*, and *David C. Fathi* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

mental tobacco smoke (ETS) can form the basis of a claim for relief under the Eighth Amendment.

I

Respondent is serving a sentence of imprisonment in the Nevada prison system. At the time that this case arose, respondent was an inmate in the Nevada State Prison in Carson City, Nevada. Respondent filed a *pro se* civil rights complaint in United States District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, naming as defendants the director of the prison, the warden, the associate warden, a unit counselor, and the manager of the prison store. The complaint, dated December 18, 1986, alleged that respondent was assigned to a cell with another inmate who smoked five packs of cigarettes a day. App. 6. The complaint also stated that cigarettes were sold to inmates without properly informing of the health hazards a nonsmoking inmate would encounter by sharing a room with an inmate who smoked, *id.*, at 7–8, and that certain cigarettes burned continuously, releasing some type of chemical, *id.*, at 9. Respondent complained of certain health problems allegedly caused by exposure to cigarette smoke. Respondent sought injunctive relief and damages for, *inter alia*, subjecting him to cruel and unusual punishment by jeopardizing his health. *Id.*, at 14.

The parties consented to a jury trial before a Magistrate. The Magistrate viewed respondent's suit as presenting two issues of law: (1) whether respondent had a constitutional right to be housed in a smoke-free environment, and (2) whether defendants were deliberately indifferent to respondent's serious medical needs. App. to Pet. for Cert. D2–D3. The Magistrate, after citing applicable authority, concluded that respondent had no constitutional right to be free from cigarette smoke: While "society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment," society cannot yet completely agree on the resolution of these issues. *Id.*, at D3, D6. The Magistrate

found that respondent nonetheless could state a claim for deliberate indifference to serious medical needs if he could prove the underlying facts, but held that respondent had failed to present evidence showing either medical problems that were traceable to cigarette smoke or deliberate indifference to them. *Id.*, at D6–D10. The Magistrate therefore granted petitioners' motion for a directed verdict and granted judgment for the defendants. *Id.*, at D10.

The Court of Appeals affirmed the Magistrate's grant of a directed verdict on the issue of deliberate indifference to respondent's immediate medical symptoms. *McKinney* v. *Anderson*, 924 F. 2d 1500, 1512 (CA9 1991). The Court of Appeals also held that the defendants were immune from liability for damages since there was at the time no clearly established law imposing liability for exposing prisoners to ETS.* Although it agreed that respondent did not have a constitutional right to a smoke-free prison environment, the court held that respondent had stated a valid cause of action under the Eighth Amendment by alleging that he had been involuntarily exposed to levels of ETS that posed an unreasonable risk of harm to his future health. *Id.*, at 1509. In support of this judgment, the court noticed scientific opinion supporting respondent's claim that sufficient exposure to ETS could endanger one's health. *Id.*, at 1505–1507. The court also concluded that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated current standards of decency. *Id.*, at 1508. The court therefore held that the Magistrate erred by directing a verdict without permitting respondent to prove that his exposure to ETS was sufficient to constitute an unreasonable danger to his future health.

Petitioners sought review in this Court. In the meantime, this Court had decided *Wilson* v. *Seiter*, 501 U. S. 294 (1991), which held that, while the Eighth Amendment applies

*This was true of the defendants' alleged liability for housing respondent with a cellmate who smoked five packs of cigarettes each day.

to conditions of confinement that are not formally imposed as a sentence for a crime, such claims require proof of a subjective component, and that where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of *Estelle* v. *Gamble*, 429 U. S. 97 (1976). We granted certiorari in this case, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of *Seiter*. 502 U. S. 903 (1991).

On remand, the Court of Appeals noted that *Seiter* added an additional subjective element that respondent had to prove to make out an Eighth Amendment claim, but did not vitiate its determination that it would be cruel and unusual punishment to house a prisoner in an environment exposing him to levels of ETS that pose an unreasonable risk of harming his health—the objective component of respondent's Eighth Amendment claim. *McKinney* v. *Anderson*, 959 F. 2d 853, 854 (CA9 1992). The Court of Appeals therefore reinstated its previous judgment and remanded for proceedings consistent with its prior opinion and with *Seiter*. 959 F. 2d, at 854.

Petitioners again sought review in this Court, contending that the decision below was in conflict with the en banc decision of the Court of Appeals for the Tenth Circuit in *Clemmons* v. *Bohannon*, 956 F. 2d 1523 (1992). We granted certiorari. 505 U. S. 1218 (1992). We affirm.

II

The petition for certiorari which we granted not only challenged the Court of Appeals' holding that respondent had stated a valid Eighth Amendment claim, but also asserted, as did its previous petition, that it was improper for the Court of Appeals to decide the question at all. Pet. for Cert. 25–29. Petitioners claim that respondent's complaint rested only on the alleged current effects of exposure to cigarette

smoke, not on the possible future effects; that the issues framed for trial were likewise devoid of such an issue; and that such a claim was not presented, briefed, or argued on appeal and that the Court of Appeals erred in *sua sponte* deciding it. *Ibid.* Brief for Petitioners 46–49. The Court of Appeals was apparently of the view that the claimed entitlement to a smoke-free environment subsumed the claim that exposure to ETS could endanger one's future health. From its examination of the record, the court stated that "[b]oth before and during trial, McKinney sought to litigate the degree of his exposure to ETS and the actual and potential effects of such exposure on his health," 924 F. 2d, at 1503; stated that the Magistrate had excluded evidence relating to the potential health effects of exposure to ETS; and noted that two of the issues on appeal addressed whether the Magistrate erred in holding as a matter of law that compelled exposure to ETS does not violate a prisoner's rights and whether it was error to refuse to appoint an expert witness to testify about the health effects of such exposure. While the record is ambiguous and the Court of Appeals might well have affirmed the Magistrate, we hesitate to dispose of this case on the basis that the court misread the record before it. We passed over the same claim when we vacated the judgment below and remanded when the case was first before us, Pet. for Cert., O. T. 1991, No. 91–269, pp. 23–26, and the primary question on which certiorari was granted, and the question to which petitioners have devoted the bulk of their briefing and argument, is whether the court below erred in holding that McKinney had stated an Eighth Amendment claim on which relief could be granted by alleging that his compelled exposure to ETS poses an unreasonable risk to his health.

III

It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. As we said

in *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 199–200 (1989):

> "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e. g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment . . . ."

Contemporary standards of decency require no less. *Estelle* v. *Gamble*, 429 U. S., at 103–104. In *Estelle*, we concluded that although accidental or inadvertent failure to provide adequate medical care to a prisoner would not violate the Eighth Amendment, "deliberate indifference to serious medical needs of prisoners" violates the Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency. *Id.*, at 104. *Wilson* v. *Seiter*, 501 U. S. 294 (1991), later held that a claim that the conditions of a prisoner's confinement violate the Eighth Amendment requires an inquiry into the prison officials' state of mind. "'Whether one characterizes the treatment received by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle*.'" *Id.*, at 303.

Petitioners are well aware of these decisions, but they earnestly submit that unless McKinney can prove that he is currently suffering serious medical problems caused by exposure to ETS, there can be no violation of the Eighth Amendment. That Amendment, it is urged, does not pro-

tect against prison conditions that merely threaten to cause health problems in the future, no matter how grave and imminent the threat.

We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In *Hutto* v. *Finney*, 437 U. S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." *DeShaney*, *supra*, at 200. It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg* v. *Romeo*, 457 U. S. 307, 315–316 (1982). It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. Two of them were cited with approval in *Rhodes* v. *Chapman*, 452 U. S. 337, 352, n. 17 (1981). *Gates* v. *Collier*, 501 F. 2d 1291

(CA5 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates. *Ramos* v. *Lamm*, 639 F. 2d 559, 572 (CA10 1980), stated that a prisoner need not wait until he is actually assaulted before obtaining relief. As respondent points out, the Court of Appeals cases to the effect that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering are legion. See Brief for Respondent 24–27. We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

The United States as *amicus curiae* supporting petitioners does not contend that the Amendment permits "even those conditions of confinement that truly pose a significant risk of proximate and substantial harm to an inmate, so long as the injury has not yet occurred and the inmate does not yet suffer from its effects." Brief for United States as *Amicus Curiae* 19. *Hutto* v. *Finney*, the United States observes, teaches as much. The Government recognizes that there may be situations in which exposure to toxic or similar substances would "present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented—that" the Amendment's protection would be available even though the effects of exposure might not be manifested for some time. Brief for United States as *Amicus Curiae* 19. But the United States submits that the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a "'serious medical nee[d],'" and that exposure to ETS is not contrary to current standards of decency. *Id.*, at 20–22. It would be premature for us, however, as a matter of law to

reverse the Court of Appeals on the basis suggested by the United States. The Court of Appeals has ruled that McKinney's claim is that the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered and has remanded to permit McKinney to attempt to prove his case. In the course of such proof, he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight. We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.

IV

We affirm the holding of the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health. We also affirm the remand to the District Court to provide an opportunity for McKinney to prove his allegations, which will require him to prove both the subjective and objective elements necessary to prove an Eighth Amendment violation. The District Court will have the usual authority to control the order of proof, and if there is a failure of proof on the first element that it chooses to consider, it would not be an abuse of discretion to give judgment for petitioners without taking further evidence. McKinney must also prove that he is entitled to the remedy of an injunction.

With respect to the objective factor, McKinney must show that he himself is being exposed to unreasonably high levels of ETS. Plainly relevant to this determination is the fact that McKinney has been moved from Carson City to Ely State Prison and is no longer the cellmate of a five-pack-a-day smoker. While he is subject to being moved back to Carson City and to being placed again in a cell with a heavy

smoker, the fact is that at present he is not so exposed. Moreover, the director of the Nevada State Prisons adopted a formal smoking policy on January 10, 1992. This policy restricts smoking in "program, food preparation/serving, recreational and medical areas" to specifically designated areas. It further provides that wardens may, contingent on space availability, designate nonsmoking areas in dormitory settings, and that institutional classification committees may make reasonable efforts to respect the wishes of nonsmokers where double bunking obtains. See App. to Brief for United States as *Amicus Curiae* A1–A2. It is possible that the new policy will be administered in a way that will minimize the risk to McKinney and make it impossible for him to prove that he will be exposed to unreasonable risk with respect to his future health or that he is now entitled to an injunction.

Also with respect to the objective factor, determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

On remand, the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals. Indeed, the adoption of the smoking policy mentioned above will bear heavily on the inquiry into deliberate indifference. In this respect we note that at oral argument McKinney's counsel was of the view that depending on how the new policy was administered, it could be very difficult to demonstrate that

prison authorities are ignoring the possible dangers posed by exposure to ETS. Tr. of Oral Arg. 33. The inquiry into this factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration.

V

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Last Term, in *Hudson* v. *McMillian*, 503 U. S. 1 (1992), the Court held that the Eighth Amendment prohibits the use of force that causes a prisoner only minor injuries. Believing that the Court had expanded the Eighth Amendment "beyond all bounds of history and precedent," *id.*, at 28, I dissented. Today the Court expands the Eighth Amendment in yet another direction, holding that it applies to a prisoner's mere *risk* of injury. Because I find this holding no more acceptable than the Court's holding in *Hudson*, I again dissent.

I

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Court holds that a prisoner states a cause of action under the Cruel and Unusual Punishments Clause by alleging that prison officials, with deliberate indifference, have exposed him to an unreasonable risk of harm. This decision, like every other "conditions of confinement" case since *Estelle* v. *Gamble*, 429 U. S. 97 (1976), rests on the premise that deprivations suffered by a prisoner constitute "punishmen[t]" for Eighth Amendment purposes, even when the deprivations have not been inflicted as part of a criminal sentence. As I suggested in *Hudson*,

see 503 U. S., at 18–20, I have serious doubts about this premise.

A

At the time the Eighth Amendment was ratified, the word "punishment" referred to the penalty imposed for the commission of a crime. See 2 T. Cunningham, A New and Complete Law-Dictionary (1771) ("the penalty of transgressing the laws"); 2 T. Sheridan, A General Dictionary of the English Language (1780) ("[a]ny infliction imposed in vengeance of a crime"); J. Walker, A Critical Pronouncing Dictionary (1791) (same); 4 G. Jacob, The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law 343 (1811) ("[t]he penalty for transgressing the Law"); 2 N. Webster, American Dictionary of the English Language (1828) ("[a]ny pain or suffering inflicted on a person for a crime or offense"). That is also the primary definition of the word today. As a legal term of art, "punishment" has always meant a "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him." Black's Law Dictionary 1234 (6th ed. 1990). And this understanding of the word, of course, does not encompass a prisoner's injuries that bear no relation to his sentence.

Nor, as far as I know, is there any historical evidence indicating that the Framers and ratifiers of the Eighth Amendment had anything other than this common understanding of "punishment" in mind. There is "no doubt" that the English Declaration of Rights of 1689 is the "antecedent of our constitutional text," *Harmelin* v. *Michigan*, 501 U. S. 957, 966 (1991) (opinion of SCALIA, J.), and "the best historical evidence" suggests that the "cruell and unusuall Punishments" provision of the Declaration of Rights was a response to *sentencing* abuses of the King's Bench, *id.*, at 968. Just as there was no suggestion in English constitutional history

that harsh prison conditions might constitute cruel and unusual (or otherwise illegal) "punishment," the debates surrounding the framing and ratification of our own Constitution and Bill of Rights were silent regarding this possibility. See 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (Congress should be prevented from "inventing the most cruel and unheard-of punishments, *and annexing them to crimes*") (emphasis added); 1 Annals of Cong. 753–754 (1789). The same can be said of the early commentaries. See 3 J. Story, Commentaries on the Constitution of the United States 750–751 (1833); T. Cooley, Constitutional Limitations 694 (8th ed. 1927).

To the extent that there is any affirmative historical evidence as to whether injuries sustained in prison might constitute "punishment" for Eighth Amendment purposes, that evidence is consistent with the ordinary meaning of the word. As of 1792, the Delaware Constitution's analogue of the Eighth Amendment provided that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; *and in the construction of jails a proper regard shall be had to the health of prisoners.*" Del. Declaration of Rights, Art. I, § XI (1792) (emphasis added). This provision suggests that when members of the founding generation wished to make prison conditions a matter of constitutional guarantee, they knew how to do so.

Judicial interpretations of the Cruel and Unusual Punishments Clause were, until quite recently, consistent with its text and history. As I observed in *Hudson*, see 503 U. S., at 19, lower courts routinely rejected "conditions of confinement" claims well into this century, see, *e. g.*, *Negrich* v. *Hohn*, 246 F. Supp. 173, 176 (WD Pa. 1965) ("Punishment is a penalty inflicted by a judicial tribunal in accordance with law in retribution for criminal conduct"), and this Court did not so much as intimate that the Cruel and Unusual Punishments Clause might reach prison conditions for the first 185

years of the provision's existence. It was not until the 1960's that lower courts began applying the Eighth Amendment to prison deprivations, see, *e. g.*, *Wright* v. *McMann*, 387 F. 2d 519, 525–526 (CA2 1967); *Bethea* v. *Crouse*, 417 F. 2d 504, 507–508 (CA10 1969), and it was not until 1976, in *Estelle* v. *Gamble*, 429 U. S. 97, that this Court first did so.

Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose "punishment." At a minimum, I believe that the original meaning of "punishment," the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged. It was certainly not discharged in *Estelle* v. *Gamble*.

B

The inmate in *Estelle* claimed that inadequate treatment of a back injury constituted cruel and unusual punishment. The Court ultimately rejected this claim, but not before recognizing that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment. *Id.*, at 104. In essence, however, this extension of the Eighth Amendment to prison conditions rested on little more than an *ipse dixit*. There was no analysis of the text of the Eighth Amendment in *Estelle*, and the Court's discussion of the provision's history consisted of the following single sentence: "It suffices to note that the primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment." *Id.*, at 102. And although the Court purported to rely upon "our decisions interpreting" the Eighth Amendment, *ibid.*, none of the six cases it cited, see *id.*, at 102–103, held that the Eighth Amendment applies to prison deprivations—or, for that matter, even addressed

a claim that it does. All of those cases involved challenges to a sentence imposed for a criminal offense.[1]

The only authorities cited in *Estelle* that supported the Court's extension of the Eighth Amendment to prison deprivations were lower court decisions (virtually all of which had been decided within the previous 10 years), see *id.*, at 102, 104–105, nn. 10–12, 106, n. 14, and the only one of those decisions upon which the Court placed any substantial reliance was *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968). But *Jackson*, like *Estelle* itself, simply *asserted* that the Eighth Amendment applies to prison deprivations; the Eighth Circuit's discussion of the problem consisted of a two-sentence paragraph in which the court was content to state the opposing view and then reject it: "Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both." 404 F. 2d, at 580–581. As in *Estelle*, there was no analysis of the text or history of the Cruel and Unusual Punishments Clause.[2]

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[1] *Gregg* v. *Georgia*, 428 U. S. 153 (1976), was a death penalty case, as were *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), *In re Kemmler*, 136 U. S. 436 (1890), and *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947). *Weems* v. *United States*, 217 U. S. 349 (1910), involved a challenge to a sentence imposed for the crime of falsifying a document, and *Trop* v. *Dulles*, 356 U. S. 86 (1958), presented the question whether revocation of citizenship amounts to cruel and unusual punishment when imposed upon those who desert the military.

[2] *Jackson* may in any event be distinguishable. That case involved an Eighth Amendment challenge to the use of the "strap" as a disciplinary measure in Arkansas prisons, and it is at least arguable that whipping a prisoner who has violated a prison rule is sufficiently analogous to imposing a sentence for violation of a criminal law that the Eighth Amendment is implicated. But disciplinary measures for violating prison rules are quite different from inadequate medical care or housing a prisoner with a heavy smoker.

II

To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment.* The text and history of the Eighth Amendment, together with pre-*Estelle* precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle.* I need not make that decision today, however, because this case is not a straightforward application of *Estelle.* It is, instead, an extension.

In *Hudson,* the Court extended *Estelle* to cases in which the prisoner has suffered only minor injuries; here, it extends *Estelle* to cases in which there has been no injury at all.[3] Because I seriously doubt that *Estelle* was correctly decided, I decline to join the Court's holding. *Stare decisis* may call for hesitation in overruling a dubious precedent, but it does not demand that such a precedent be expanded to its outer limits. I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment.

Accordingly, I would reverse the judgment of the Court of Appeals.

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[3] None of our prior decisions, including the three that are cited by the Court today, see *ante,* at 33, held that the mere threat of injury can violate the Eighth Amendment. In *Hutto* v. *Finney,* 437 U. S. 678 (1978), the defendants challenged the district court's *remedy;* they did not dispute the court's conclusion that "conditions in [the] prisons . . . constituted cruel and unusual punishment." *Id.,* at 685. *Youngberg* v. *Romeo,* 457 U. S. 307 (1982), involved the liberty interests (under the Due Process Clause) of an involuntarily committed mentally retarded person, and *DeShaney* v. *Winnebago County Dept. of Social Services,* 489 U. S. 189 (1989), involved the due process rights of a child who had been beaten by his father in the home.

Syllabus

RENO, ATTORNEY GENERAL, ET AL. *v.* CATHOLIC SOCIAL SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1826. Argued January 11, 1993—Decided June 18, 1993

Under the alien legalization program created by Title II of the Immigration Reform and Control Act of 1986, an alien unlawfully present in the United States who sought permission to reside permanently had to apply first for temporary resident status by establishing, *inter alia*, that he had resided continuously in this country in an unlawful status and had been physically present here continuously for specified periods. After the Immigration and Naturalization Service (INS) issued regulations construing particular aspects of, respectively, the "continuous physical presence" and "continuous unlawful residence" requirements, two separate class actions were brought, each challenging one of the regulations on behalf of aliens whom it would render ineligible for legalization. In each instance, the District Court struck down the challenged regulation as inconsistent with the Reform Act and issued a remedial order directing the INS to accept legalization applications beyond the statutory deadline. The Court of Appeals, among other rulings, consolidated the INS's appeals from the remedial orders, rejected the INS's argument that the Reform Act's restrictive judicial review provisions barred district court jurisdiction in each case, and affirmed the District Courts' judgments.

Held: The record is insufficient to allow this Court to decide all issues necessary to determine whether the District Courts had jurisdiction. Pp. 53–67.

(a) The Reform Act's exclusive review scheme—which applies to "determination[s] respecting an application for adjustment of status," 8 U. S. C. § 1255a(f)(1), and specifies that "a denial" of such adjustment may be judicially scrutinized "only in the . . . review of an order of deportation" in the courts of appeals, § 1255a(f)(4)(A)—does not preclude district court jurisdiction over an action which, in challenging the legality of an INS regulation, does not refer to or rely on the denial of any individual application. The statutory language delimiting the jurisdictional bar refers only to review of such an individual denial. *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 494. Pp. 53–56.

(b) However, the promulgation of the challenged regulations did not itself affect each of the plaintiff class members concretely enough to

render his claim "ripe" for judicial review, as is required by, *e. g., Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–149. The regulations impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens. Rather, the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations. It delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of the Act's conditions, not merely those interpreted by the regulations in question. In these circumstances, a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying a regulation to him. Ordinarily, that barrier would appear when the INS formally denied the alien's application on the ground that a regulation rendered him ineligible for legalization. But a plaintiff who sought to rely on such a denial to satisfy the ripeness requirement would then still find himself at least temporarily barred by the Reform Act's exclusive review provisions, since he would be seeking "judicial review of a determination respecting an application" under § 1255a(f)(1). Pp. 56–61.

(c) Nevertheless, the INS's "front-desking" policy—which directs employees to reject applications at a Legalization Office's front desk if the applicant is statutorily ineligible for adjustment of status—may well have left some of the plaintiffs with ripe claims that are outside the scope of § 1255a(f)(1). A front-desked class member whose application was rejected because one of the regulations at issue rendered him ineligible for legalization would have felt the regulation's effects in a particularly concrete manner, for his application would have been blocked then and there; his challenge to the regulation should not fail for lack of ripeness. Front-desking would also have the untoward consequence for jurisdictional purposes of effectively excluding such an applicant from access even to the Reform Act's limited administrative and judicial review procedures, since he would have no formal denial to appeal administratively nor any opportunity to build an administrative record on which judicial review might be based. Absent clear and convincing evidence of a congressional intent to preclude judicial review entirely, it must be presumed that front-desked applicants may obtain district court review of the regulations in these circumstances. See *McNary, supra*, at 496–497. However, as there is also no evidence that particular class members were actually subjected to front-desking, the jurisdictional issue cannot be resolved on the records below. Because, as the cases have been presented to this Court, only those class members (if any) who were front-desked have ripe claims over which the District Courts should exercise jurisdiction, the cases must be remanded for

new jurisdictional determinations and, if appropriate, remedial orders. Pp. 61–67.

956 F. 2d 914, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 67. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 77.

Ronald J. Mann argued the cause for petitioners. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Mahoney*, and *Michael Jay Singer*.

Ralph Santiago Abascal argued the cause for respondents. With him on the brief were *Stephen A. Rosenbaum, Peter A. Schey*, and *Carlos R. Holguin*.*

JUSTICE SOUTER delivered the opinion of the Court.

This petition joins two separate suits, each challenging a different regulation issued by the Immigration and Naturalization Service (INS) in administering the alien legalization program created by Title II of the Immigration Reform and Control Act of 1986. In each instance, a District Court struck down the regulation challenged and issued a remedial order directing the INS to accept legalization applications beyond the statutory deadline; the Court of Appeals consolidated the INS's appeals from these orders, and affirmed the District Courts' judgments. We are now asked to consider whether the District Courts had jurisdiction to hear the challenges, and whether their remedial orders were permitted

*Briefs of *amici curiae* urging affirmance were filed for the city of Chicago et al. by *Lawrence Rosenthal, John Payton, O. Peter Sherwood, Leonard J. Koerner*, and *Stephen J. McGrath;* for the American Bar Association by *J. Michael McWilliams, Ira Kurzban, Robert A. Williams*, and *Carol L. Wolchok;* for the American Civil Liberties Union et al. by *Lucas Guttentag, Steven R. Shapiro, John A. Powell*, and *Carolyn P. Blum;* and for Church World Service et al. by *Steven L. Mayer*.

by law. We find the record insufficient to decide all jurisdictional issues and accordingly vacate and remand for new jurisdictional determinations and, if appropriate, remedial orders limited in accordance with the views expressed here.

I

On November 6, 1986, the President signed the Immigration Reform and Control Act of 1986, Pub. L. 99–603, 100 Stat. 3359, Title II of which established a scheme under which certain aliens unlawfully present in the United States could apply, first, for the status of a temporary resident and then, after a 1-year wait, for permission to reside permanently.[1] An applicant for temporary resident status must have resided continuously in the United States in an unlawful status since at least January 1, 1982, 8 U. S. C. § 1255a(a)(2)(A); must have been physically present in the United States continuously since November 6, 1986, the date the Reform Act was enacted, § 1255a(a)(3)(A); and must have been otherwise admissible as an immigrant, § 1255a(a)(4). The applicant must also have applied during the 12-month period beginning on May 5, 1987. § 1255a(a)(1).[2]

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[1] The Immigration Reform and Control Act of 1986 amended the Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* Section 201(a)(1) of the Reform Act created the alien legalization program at issue in this case by adding § 245A to the Immigration and Nationality Act, codified at 8 U. S. C. § 1255a. For the sake of convenience, we will refer to the sections of the Act as they have been codified.

[2] The Reform Act requires the 12-month period to "begi[n] on a date (not later than 180 days after November 6, 1986) designated by the Attorney General." 8 U. S. C. § 1255a(a)(1)(A). The Attorney General set the period to begin on May 5, 1987, the latest date the Reform Act authorized him to designate. See 8 CFR § 245a.2(a)(1) (1992). A separate provision of the Act requires "[a]n alien who, at any time during the first 11 months of the 12-month period . . . , is the subject of an order to show cause [why he should not be deported]" to "make application . . . not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is

The two separate suits joined before us challenge regulations addressing, respectively, the first two of these four requirements. The first, *Reno* v. *Catholic Social Services, Inc. (CSS), et al.*, focuses on an INS interpretation of 8 U. S. C. § 1255a(a)(3), the Reform Act's requirement that applicants for temporary residence prove "continuous physical presence" in the United States since November 6, 1986. To mitigate this requirement, the Reform Act provides that "brief, casual, and innocent absences from the United States" will not break the required continuity. § 1255a(a)(3)(B). In a telex sent to its regional offices on November 14, 1986, however, the INS treated the exception narrowly, stating that it would consider an absence "brief, casual, and innocent" only if the alien had obtained INS permission, known as "advance parole," before leaving the United States; aliens who left without it would be "ineligible for legalization." App. 186. The INS later softened this limitation somewhat by regulations issued on May 1, 1987, forgiving a failure to get advance parole for absences between November 6, 1986, and May 1, 1987. But the later regulation confirmed that any absences without advance parole on or after May 1, 1987, would not be considered "brief, casual, and innocent" and would therefore be taken to have broken the required continuity. See 8 CFR § 245a.1(g) (1992) ("Brief, casual, and innocent means a departure authorized by [the INS] (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes").

The *CSS* plaintiffs challenged the advance parole regulation as an impermissible construction of the Reform Act. After certifying the case as a class action, the District Court eventually defined a class comprising "persons prima facie eligible for legalization under [8 U. S. C. § 1255a] who de-

later." § 1255a(a)(1)(B); see § 1255a(e)(1) (providing further relief for certain aliens "apprehended before the beginning of the application period").

parted and reentered the United States without INS authorization (i. e. 'advance parole') after the enactment of the [Reform Act] following what they assert to have been a brief, casual and innocent absence from the United States."[3] No. Civ. S–86–1343 LKK (ED Cal., May 3, 1988) (App. 50). On April 22, 1988, 12 days before the end of the legalization program's 12-month application period, the District Court granted partial summary judgment invalidating the regulation and declaring that "brief, casual, and innocent" absences did not require prior INS approval. No. Civ. S–86–1343 LKK (ED Cal., Apr. 22, 1988) (Record, Doc. No. 161); see *Catholic Social Services, Inc.* v. *Meese*, 685 F. Supp. 1149 (ED Cal. 1988) (explaining the basis of the April 22 order). No appeal was taken by the INS (by which initials we will refer to the Immigration and Naturalization Service and the Attorney General collectively), and after further briefing on remedial issues the District Court issued an order on June 10, 1988, requiring the INS to extend the application period to November 30, 1988[4] for class members who "knew of [the INS's] unlawful regulation and thereby concluded that they

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[3] The *CSS* lawsuit originally challenged various aspects of the INS's administration of both the legalization program created by Title II of the Reform Act and the "Special Agricultural Workers" (SAW) legalization program created by Part A of Title III of the Reform Act (codified at 8 U. S. C. § 1160). The challenge to the SAW program eventually took its own procedural course, and was resolved by a district court order that neither party appealed. No. Civ. S–86–1343 LKK (ED Cal., Aug. 11, 1988) (App. 3, Record, Doc. No. 188). With respect to the Title II challenge, the District Court originally certified a broad class comprising all persons believed by the Government to be deportable aliens who could establish a prima facie claim for adjustment of status to temporary resident under 8 U. S. C. § 1255a. No. Civ. S–86–1343 LKK (ED Cal., Nov. 24, 1986) (App. 15). After further proceedings, the District Court narrowed the class definition to that set out in the text.

[4] The District Court chose November 30, 1988, to coincide with the deadline for legalization applications under the Reform Act's SAW program. See No. Civ. S–86–1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 22a).

were ineligible for legalization and by reason of that conclusion did not file an application."[5] No. Civ. S–86–1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 25a). Two further remedial orders issued on August 11, 1988, provided, respectively, an alternative remedy if the extension of the application period should be invalidated on appeal, and further specific relief for any class members who had been detained or apprehended by the INS or who were in deportation proceedings.[6] No. Civ. S–86–1343 LKK (ED Cal.) (Record, Doc. Nos. 187, 189). The INS appealed all three of the remedial orders.[7]

The second of the two lawsuits, styled *INS* v. *League of United Latin American Citizens (LULAC) et al.*, goes to the INS's interpretation of 8 U. S. C. § 1255a(a)(2)(A), the Reform Act's "continuous unlawful residence" requirement. The Act provides that certain brief trips abroad will not break an alien's continuous unlawful residence (just as

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[5] The order also required the INS to identify all class members whose applications had been denied or recommended for denial on the basis of the advance parole regulation, and to "rescind such denials . . . and readjudicate such applications in a manner consistent with the court's order." No. Civ. S–86–1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 24a). The INS did not appeal this part of the order. See Brief for Petitioners 11, n. 11.

[6] The latter order required the INS to provide apprehended and detained aliens, and those in deportation proceedings, with "a reasonable opportunity, of not less than thirty (30) days, to submit an application [for legalization]." See n. 2, *supra* (describing the Act's provisions regarding such aliens); n. 12, *infra* (describing the *LULAC* court's relief for such aliens in *INS* v. *League of United Latin American Citizens*).

[7] The *CSS* plaintiffs cross-appealed, challenging the District Court's denial of their request for an injunction ordering the INS to permit class members outside the United States to enter the United States so that they could file applications for adjustment of status. The Court of Appeals affirmed the District Court's denial, see *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F. 2d 914, 923 (CA9 1992), and the plaintiffs did not petition this Court for review of the Court of Appeals' judgment; thus, the issues presented by the cross-appeal are not before us.

certain brief absences from the United States would not violate the "continuous physical presence" requirement). See § 1255a(g)(2)(A). Under an INS regulation, however, an alien would fail the "continuous unlawful residence" requirement if he had gone abroad and reentered the United States by presenting "facially valid" documentation to immigration authorities. 8 CFR § 245a.2(b)(8) (1992).[8] On the INS's reasoning, an alien's use of such documentation made his subsequent presence "lawful" for purposes of § 1255a(a)(2)(A), thereby breaking the continuity of his unlawful residence. Thus, an alien who had originally entered the United States under a valid nonimmigrant visa, but had become an unlawful resident by violating the terms of that visa in a way known to the Government before January 1, 1982, was eligible for relief under the Reform Act. If, however, the same alien left the United States briefly and then used the same visa to get back in (a facially valid visa that had in fact become invalid after his earlier violation of its terms), he rendered himself ineligible.

In July 1987, the *LULAC* plaintiffs brought suit challenging the reentry regulation as inconsistent both with the Act and the equal protection limitation derived from Fifth Amendment due process. With this suit still pending, on November 17, 1987, some seven months into the Reform

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[8] This regulation expresses the INS policy in signally cryptic form, stating that an alien's eligibility "shall not be affected by entries to the United States subsequent to January 1, 1982 that were not documented on Service Form I–94, Arrival-Departure Record." By negative implication, an alien *would* be rendered ineligible by an entry that *was* documented on an I–94 form. An entry is documented on an I–94 form when it occurs through a normal, official port of entry, at which an alien must present some valid-looking document (for example, a nonimmigrant visa) to get into the United States. See 8 CFR § 235.1(f) (1992). Under the INS policy, an alien who reentered by presenting such a "facially valid" document broke the continuity of his unlawful residence, whereas an alien who reentered the United States by crossing a desolate portion of the border, thus avoiding inspection altogether, maintained that continuity.

Act's 12-month application period, the INS modified its reentry policy by issuing two new regulations.[9] The first, codified at 8 CFR §245a.2(b)(9) (1992), specifically acknowledged the eligibility of an alien who "reentered the United States as a nonimmigrant . . . in order to return to an unrelinquished unlawful residence," so long as he "would be otherwise eligible for legalization and . . . was present in the United States in an unlawful status prior to January 1, 1982." 52 Fed. Reg. 43845 (1987). The second, codified at 8 CFR §245a.2(b)(10) (1992), qualified this expansion of eligibility by obliging such an alien to obtain a waiver of a statutory provision requiring exclusion of aliens who enter the United States by fraud. *Ibid.*

Although the *LULAC* plaintiffs then amended their complaint, they pressed their claim that 8 CFR §245a.2(b)(8) (1992), the reentry regulation originally challenged, had been invalid prior to its modification. As to that claim, the District Court certified the case as a class action, with a class including

> "all persons who qualify for legalization but who were deemed ineligible for legalization under the original [reentry] policy, who learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply for legalization before the May 4, 1988 deadline."[10] No. 87–4757–WDK (JRx) (CD Cal., July 15, 1988) (App. 216).

[9] The INS first announced its intention to modify its policy in a statement issued by then-INS Commissioner Alan Nelson on October 8, 1987, see Record, Addendum to Doc. No. 8; however, it did not issue the new regulations until November 17 following.

[10] The *LULAC* plaintiffs also challenged the modified policy, claiming that aliens should not have to comply with the requirement of 8 CFR §245a.2(b)(10) (1992) to obtain a waiver of excludability for having fraudulently procured entry into the United States. With respect to this challenge, the District Court certified a second class comprising persons adversely affected by the modified policy. See No. 87–4757–WDK (JRx) (CD Cal., July 15, 1988) (App. 216). However, the District Court ultimately

On July 15, 1988, 10 weeks after the end of the 12-month application period, the District Court held the regulation invalid, while reserving the question of remedy. *Ibid.* (App. 224–225). Again, the INS took no appeal. The *LULAC* plaintiffs then sought a remedial order extending the application period for class members to November 30, 1988,[11] and compelling the INS to publicize the modified policy and the extended application period. They argued that the INS had effectively truncated the 12-month application period by enforcing the invalid regulation, by publicizing the regulation so as to dissuade potential applicants, and by failing to give sufficient publicity to its change in policy. On August 12, 1988, the District Court granted the plaintiffs' request for injunctive relief.[12] No. 87–4757–WDK (JRx) (CD Cal., Aug. 12, 1988) (App. to Pet. for Cert. 50a). The INS appealed this remedial order.

In its appeals in both *CSS* and *LULAC*, the INS raised two challenges to the orders of the respective District Courts. First, it argued that the restrictive judicial review provisions of the Reform Act barred district court jurisdiction over the claim in each case. It contended, second, that each District Court erred in ordering an extension of the 12-month application period, the 12-month limit being, it maintained, a substantive statutory restriction on relief beyond the power of a court to alter.

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rejected the challenge to the modified policy, see *ibid.* (App. 234), and the *LULAC* plaintiffs did not appeal the grant of summary judgment to the INS on this issue.

[11] As in the *CSS* case, this date was chosen to coincide with the deadline for legalization applications under the Reform Act's SAW program. No. 87–4757–WDK (JRx) (CD Cal., Aug. 12, 1988) (App. to Pet. for Cert. 50a); see n. 5, *supra.*

[12] The order also required the INS to give those illegal aliens apprehended by INS enforcement officials "adequate time" to apply for legalization. App. to Pet. for Cert. 60a; see n. 2, *supra* (describing the Act's provisions regarding such aliens); n. 6, *supra* (describing the *CSS* court's relief for such aliens).

The Ninth Circuit eventually consolidated the two appeals. After holding them pending this Court's disposition of *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), it rendered a decision in February 1992, affirming the District Courts.[13] *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F. 2d 914 (1992). We were prompted to grant certiorari, 505 U. S. 1203 (1992), by the importance of the issues, and by a conflict between Circuits on the jurisdictional issue, see *Ayuda, Inc.* v. *Thornburgh*, 292 U. S. App. D. C. 150, 156–162, 948 F. 2d 742, 748–754 (1991) (holding that the Reform Act precluded district court jurisdiction over a claim that INS regulations were inconsistent with the Act), cert. pending, No. 91–1924. We now vacate and remand.

II

The Reform Act not only sets the qualifications for obtaining temporary resident status, but also provides an exclusive scheme for administrative and judicial review of "determination[s] respecting . . . application[s] for adjustment of status" under the Title II legalization program. 8 U. S. C. § 1255a(f)(1). Section 1255a(f)(3)(A) directs the Attorney General to "establish an appellate authority to provide for a single level of administrative appellate review" of such deter-

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[13] While the appeals were pending in the Ninth Circuit, the orders of the District Courts were each subject to a stay order. Under the terms of each stay order, the INS was obliged to grant a stay of deportation and temporary work authorization to any class member whose application made a prima facie showing of eligibility for legalization, but was not obliged to process the applications. See App. to Pet. for Cert. 63a–64a. Because the Court of Appeals has stayed its mandate pending this Court's disposition of the case, see Nos. 88–15046, 88–15127, 88–15128, 88–6447 (CA9, May 1, 1992) (staying the mandate); Nos. 88–15046, 88–15127, 88–15128, 88–6447 (CA9, Sept. 17, 1992) (denying the INS's motion to dissolve the stay and issue its mandate), the INS is still operating under these stay orders. By March 1992, it had received some 300,000 applications for temporary resident status under the stay orders. See App. to Pet. for Cert. 83a.

minations. Section 1255a(f)(4)(A) provides that a denial of adjustment of status is subject to review by a court "only in the judicial review of an order of deportation under [8 U. S. C. § 1105a]"; under § 1105a, this review takes place in the courts of appeals. Section 1255a(f)(1) closes the circle by explicitly rendering the scheme exclusive: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection."

Under this scheme, an alien denied adjustment of status by the INS in the first instance may appeal to the Associate Commissioner for Examinations, the "appellate authority" designated by the Attorney General pursuant to § 1255a(f)(3)(A). See 8 CFR §§ 103.1(f)(1)(xxvii), 245a.2(p) (1992). Although the Associate Commissioner's decision is the final agency action on the application, an adverse decision does not trigger deportation proceedings. On the contrary, because the Reform Act generally allows the INS to use information in a legalization application only to make a determination on the application, see 8 U. S. C. § 1255a(c)(5),[14] an alien whose appeal has been rejected by the Associate Commissioner stands (except for a latent right to judicial review of that rejection) in the same position he did before he applied: he is residing in the United States in an unlawful status, but the Government has not found out about him yet.[15]

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[14] The INS may also use the information to enforce a provision penalizing the filing of fraudulent applications, and to prepare statistical reports to Congress. § 1255a(c)(5)(A).

[15] This description excludes the alien who was already in deportation proceedings before he applied for legalization under § 1255a. Once his application is denied, however, such an alien must also continue with deportation proceedings as if he had never applied, and may obtain further review of the denial of his application only upon review of a final order of deportation entered against him. See 8 U. S. C. § 1255a(f)(4)(A). The Act's provisions regarding aliens who have been issued an order to show cause before applying are described at n. 2, *supra;* the provisions of the

We call the right to judicial review "latent" because § 1255a(f)(4)(A) allows judicial review of a denial of adjustment of status only on appeal of "an order of deportation." Hence, the alien must first either surrender to the INS for deportation [16] or wait for the INS to catch him and commence a deportation proceeding, and then suffer a final adverse decision in that proceeding, before having an opportunity to challenge the INS's denial of his application in court.

The INS takes these provisions to preclude the District Courts from exercising jurisdiction over the claims in both the *CSS* and *LULAC* cases, reasoning that the regulations it adopted to elaborate the qualifications for temporary resident status are "determination[s] respecting an application for adjustment of status" within the meaning of § 1255a(f)(1); because the claims in *CSS* and *LULAC* attack the validity of those regulations, they are subject to the limitations contained in § 1255a(f), foreclosing all jurisdiction in the district courts, and granting it to the courts of appeals only on review of a deportation order. The INS recognizes, however, that this reasoning is out of line with our decision in *McNary* v. *Haitian Refugee Center, Inc.*, *supra*, where we construed a virtually identical set of provisions governing judicial review within a separate legalization program for agricultural workers created by Title III of the Reform Act.[17] There, as

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District Court orders regarding such aliens are described at nn. 6 and 12, *supra*.

[16] Although aliens have no explicit statutory right to force the INS to commence a deportation proceeding, the INS has represented that "any alien who wishes to challenge an adverse determination on his legalization application may secure review by surrendering for deportation at any INS district office." Reply Brief for Petitioners 9–10 (footnote omitted).

[17] The single difference between the two sets of provisions is the addition, in the provisions now before us, of a further specific jurisdictional bar: "No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative pro-

here, the critical language was "a determination respecting an application for adjustment of status." We said that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.*, at 492. We noted that the provision permitting judicial review only in the context of a deportation proceeding also defined its scope by reference to a single act: "'judicial review of *such a denial.*'" *Ibid.* (emphasis in original) (quoting 8 U. S. C. § 1160(e)(3)); see § 1255a(f)(4)(A) (using identical language). We therefore decided that the language setting the limits of the jurisdictional bar "describes the denial of an individual application," 498 U. S., at 492, and thus "applies only to review of denials of individual . . . applications." *Id.*, at 494. The INS gives us no reason to reverse course, and we reject its argument that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation without referring to or relying on the denial of any individual application.

Section 1255a(f)(1), however, is not the only jurisdictional hurdle in the way of the *CSS* and *LULAC* plaintiffs, whose claims still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific congressional directive. To be sure, a statutory source of jurisdiction is not lacking, since 28 U. S. C. § 1331, generally granting federal-question jurisdiction, "confer[s] jurisdiction on federal courts to review agency action." *Califano* v. *Sanders*, 430 U. S. 99, 105 (1977). Neither is it fatal that the Reform Act is silent about the type of judicial review those plaintiffs seek. We customarily refuse to treat such silence "as a denial of authority to [an] aggrieved person to seek appropriate relief in the federal courts," *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944), and this custom has been "reinforced by the enactment of the Administrative Procedure Act, which embod-

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ceeding of the United States Government." 8 U. S. C. § 1255a(f)(2). As the INS appears to concede, see Brief for Petitioners 19, the claims at issue in this case do not fall within the scope of this bar.

ies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. § 702).

As we said in *Abbott Laboratories*, however, the presumption of available judicial review is subject to an implicit limitation: "injunctive and declaratory judgment remedies," what the respondents seek here, "are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution,"[18] 387 U. S., at 148, that is to say, unless the effects of the administrative action challenged have been "felt in a concrete way by the challenging parties," *id.*, at 148–149. In some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy this requirement, as it did in *Abbott Laboratories* itself. There, for example, as well as in *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167 (1967), the promulgation of the challenged regulations presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation. *Abbott Laboratories*, *supra*, at 152–153; *Gardner*, *supra*, at 171–172. But that will not be so in every case. In *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158 (1967), for example, we held that a chal-

[18] We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 114 (1976) *(per curiam)*; *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972). Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and "cannot be bound by the wishes of the parties." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 138 (1974). Although the issue of ripeness is not explicitly addressed in the questions presented in the INS's petition, it is fairly included and both parties have touched on it in their briefs before this Court. See Brief for Petitioners 20; Brief for Respondents 17, n. 23.

lenge to another regulation, the impact of which could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs," *id.*, at 164, would not be ripe before the regulation's application to the plaintiffs in some more acute fashion, since "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge," *ibid.* See *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 891 (1990) (a controversy concerning a regulation is not ordinarily ripe for review under the Administrative Procedure Act until the regulation has been applied to the claimant's situation by some concrete action).

The regulations challenged here fall on the latter side of the line. They impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens. Rather, the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations.[19] It

[19] JUSTICE O'CONNOR contends that "if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the [challenged] rule[,] then there may well be a justiciable controversy that the court may find prudent to resolve." *Post*, at 69. Even if this is true, however, we do not see how such a "firm prediction" could be made in this case. As for the prediction that the plaintiffs "will apply for the benefit," we are now considering only the cases of those plaintiffs who, in fact, failed to file timely applications. As for the prediction that "the agency will deny the application by virtue of the [challenged] rule," we reemphasize that in this case, access to the benefit in question is conditioned on several nontrivial rules other than the two challenged. This circumstance makes it much more difficult to predict firmly that the INS would deny a particular application "by virtue of the [challenged] rule," and not by virtue of some other, unchallenged rule that it determined barred an adjustment of status.

Similarly distinguishable is our decision in *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993), the factual and legal setting of which JUSTICE STEVENS appears to equate with that of the present cases, see *post*, at 81–82. In *Associated General Contractors*, the plaintiff association alleged that "many of its members regularly bid on and perform construction work for the [defendant city]," 508 U. S., at 659 (internal quotation marks omitted), thus pro-

delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of the Act's conditions, not merely those interpreted by the regulations in question. In these circumstances, the promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.[20]

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viding a historical basis for the further unchallenged allegation that the members "would have . . . bid on . . . designated set aside contracts but for the restrictions imposed by the [challenged] ordinance," *ibid.* (internal quotation marks omitted). A plaintiff in these cases can point to no similar history of application behavior to support a claim that "she would have applied . . . but for the invalid regulations," *post*, at 85; and we think the mere fact that she may have heard of the invalid regulations through a Qualified Designated Entity, a private attorney, or "word of mouth," *post*, at 80, insufficient proof of this counterfactual. Further, we defined the "injury in fact" in *Associated General Contractors* as "the inability to compete on an equal footing in the bidding process, not the loss of a contract," 508 U. S., at 666; thus, whether the association's members would have been awarded contracts but for the challenged ordinance was not immediately relevant. Here, the plaintiffs seek, not an equal opportunity to compete for adjustments of status, but the adjustments of status themselves. Under this circumstance, it becomes important to know whether they would be eligible for the adjustments but for the challenged regulations.

[20] JUSTICE O'CONNOR maintains that the plaintiffs' actions are now ripe because they have amended their complaints to seek the additional remedy of extending the application period, and the application period is now over. *Post*, at 71–72. We do not see how these facts establish ripeness. In both cases before us, the plaintiffs' underlying claim is that an INS regulation implementing the Reform Act is invalid. Because the Act requires each alien desiring legalization to take certain affirmative steps, and because the Act's conditions extend beyond those addressed by the challenged regulations, one cannot know whether the challenged regulation actually makes a concrete difference to a particular alien until one knows that he will take those affirmative steps and will satisfy the other conditions. Neither the fact that the application period is now over, nor the fact that the plaintiffs would now like the period to be extended, tells us anything about the willingness of the class members to take the required

Ordinarily, of course, that barrier would appear when the INS formally denied the alien's application on the ground that the regulation rendered him ineligible for legalization. A plaintiff who sought to rely on the denial of his application to satisfy the ripeness requirement, however, would then still find himself at least temporarily barred by the Reform Act's exclusive review provisions, since he would be seeking "judicial review of a determination respecting an application." 8 U. S. C. § 1255a(f)(1). The ripeness doctrine and the Reform Act's jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence. Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme. The *CSS* and *LULAC* plaintiffs do not

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affirmative steps, or about their satisfaction of the Reform Act's other conditions. The end of the application period may mean that the plaintiffs no longer have an opportunity to take the steps that could make their claims ripe; but this fact is significant only for those plaintiffs who can claim that the Government prevented them from filing a timely application. See *infra*, at 61–64 (discussing the INS's "front-desking" practice).

JUSTICE O'CONNOR's ripeness analysis encounters one further difficulty. In her view, the plaintiffs' claims are ripe because "[i]t is *certain* that an alien who now applies to the INS for legalization will be denied that benefit because the period has closed." *Post*, at 72 (emphasis in original). In these circumstances, she suggests, it would make no sense to require "the would-be beneficiary [to] make the wholly futile gesture of submitting an application." *Ibid.* But a plaintiff who, to establish ripeness, relies on the certainty that his application would be denied on grounds of untimeliness, must confront § 1255a(f)(2), which flatly bars all "court[s] of the United States" from reviewing "denial[s] of adjustment of status . . . based on a late filing of an application for such adjustment." We would almost certainly interpret this provision to bar such reliance, since otherwise plaintiffs could always entangle the INS in litigation over application timing claims simply by suing without filing an application, a result we believe § 1255a(f)(2) was intended to foreclose in the ordinary case.

argue that this limited scheme would afford them inadequate review of a determination based on the regulations they challenge, presumably because they would be able to obtain such review on appeal from a deportation order, if they become subject to such an order; their situation is thus different from that of the "17 unsuccessful individual SAW applicants" in *McNary*, 498 U. S., at 487, whose procedural objections, we concluded, could receive no practical judicial review within the scheme established by 8 U. S. C. § 1160(e), *id.*, at 496–497.

This is not the end of the matter, however, because the plaintiffs have called our attention to an INS policy that may well have placed some of them outside the scope of § 1255a(f)(1). The INS has issued a manual detailing procedures for its offices to follow in implementing the Reform Act's legalization programs and instructing INS employees called "Legalization Assistants" to review certain applications in the presence of the applicants before accepting them for filing. See Procedures Manual for the Legalization and Special Agricultural Worker Programs of the Immigration Reform and Control Act of 1986 (Legalization Manual or Manual).[21] According to the Manual, "[m]inor correctable deficiencies such as incomplete responses or typographical errors may be corrected by the [Legalization Assistant]." *Id.*, at IV–6. "[I]f the applicant is statutorily ineligible," however, the Manual provides that "the application *will be rejected* by the [Legalization Assistant]." *Ibid.* (emphasis added). Because this prefiling rejection of applications oc-

[21] Under the Manual's procedures, only those applications that were not prepared with the assistance of a "Qualified Designated Entity" (the Reform Act's designation for private organizations that serve as intermediaries between applicants and the INS, see 8 U. S. C. § 1255a(c)(1)) are subject to review by Legalization Assistants. The applications that were prepared with the help of Qualified Designated Entities skip this step. See Legalization Manual, at IV–5, IV–6. There is no evidence in the record indicating how many *CSS* and *LULAC* class members were assisted by Qualified Designated Entities in preparing their applications.

curs at the front desk of an INS office, it has come to be called "front-desking."[22] While the regulations challenged in *CSS* and *LULAC* were in force, Legalization Assistants who applied both the regulations and the Manual's instructions may well have "front-desked" the applications of class members who disclosed the circumstances of their trips outside the United States, and affidavits on file in the *LULAC* case represent that they did exactly that.[23] See n. 26, *infra*.

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[22] The INS forwards a different interpretation of the policy set forth in the Legalization Manual. According to the INS, the Manual reflects a policy, motivated by "charitable concern," of "inform[ing] aliens of [the INS's] view that their applications are deficient before it accepts the filing fee, so that they can make an informed choice about whether to pay the fee if they are not going to receive immediate relief." Reply Brief for Petitioners 9 (emphasis omitted). The "rejection" policy, argues the INS, did not really bar applicants from filing applications; another sentence in the Manual proves that the door remains open, for it provides that "[i]f an applicant whose application has been rejected by the [Legalization Assistant] insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip from the [Legalization Assistant] stating the noted deficiency(ies)." Legalization Manual, at IV–6.

We cannot find, in either of the two sentences the parties point to, the policy now articulated by the INS. The first sentence does not say that applicants will be informed; it says that applications will be rejected. The second sentence contains no hint that the Legalization Assistant should tell the applicant that he has a right to file an application despite the "rejection," or that he should file an application if he wants to preserve his rights. Rather, it seems to provide little more than a procedure for dealing with the pesky applicant who "won't take 'no' for an answer." Neither of the sentences preserves a realistic path to judicial review.

[23] In its reply brief in this Court, see Reply Brief for Petitioners 14, the INS argues that those individuals who were front-desked fall outside the classes defined by the District Courts, since the *CSS* class included only those who "knew of [INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," App. to Pet. for Cert. 25a, and the *LULAC* class included only those "who learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply for legalization before the May 4, 1988 deadline," App. 216. The language in *CSS* that the INS points to, however, is not

As respondents argue, see Brief for Respondents 17, n. 23, a class member whose application was "front-desked" would have felt the effects of the "advance parole" or "facially valid document" regulation in a particularly concrete manner, for his application for legalization would have been blocked then and there; his challenge to the regulation should not fail for lack of ripeness. Front-desking would also have a further, and untoward, consequence for jurisdictional purposes, for it would effectively exclude an applicant from access even to the limited administrative and judicial review procedures established by the Reform Act. He would have no formal denial to appeal to the Associate Commissioner for Examinations, nor would he have an opportunity to build an administrative record on which judicial review might be based.[24] Hence, to construe § 1255a(f)(1) to bar district court jurisdiction over his challenge, we would have to impute to Congress an intent to preclude judicial review of the legality of INS action entirely under those circumstances. As we stated recently in *McNary*, however, there is a "well-

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the class definition, which is much broader, see *supra*, at 48–49; rather, it is part of the requirements class members must meet to obtain one of the forms of relief ordered by the District Court. We understand the *LULAC* class definition to use the word "apply" to mean "have an application accepted for filing by the INS," as under this reading the definition encompasses all those whom the INS refuses to treat as having timely applied (which is the refusal that lies at the heart of the parties' dispute), and as the definition then includes those who "learned of their ineligibility" by being front-desked, since it would be odd to exclude those who learned of their ineligibility in the most direct way possible from this description. As we note below, however, see n. 29, *infra*, we believe that the word "applied" as used in § 1255a(a)(1)(A) has a broader meaning than that given to the word in the *LULAC* class definition.

[24] The Reform Act limits judicial review to "the administrative record established at the time of the review by the appellate authority." 8 U. S. C. § 1255a(f)(4)(B). In addition, an INS regulation provides that a legalization application may not "be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings." 8 CFR § 103.3(a)(3)(iii) (1992).

settled presumption favoring interpretations of statutes that allow judicial review of administrative action," 498 U. S., at 496; and we will accordingly find an intent to preclude such review only if presented with "'clear and convincing evidence,'" *Abbott Laboratories*, 387 U. S., at 141 (quoting *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962)). See generally *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–673 (1986) (discussing the presumption in favor of judicial review).

There is no such clear and convincing evidence in the statute before us. Although the phrase "a determination respecting an application for adjustment of status" could conceivably encompass a Legalization Assistant's refusal to accept the application for filing at the front desk of a Legalization Office, nothing in the statute suggests, let alone demonstrates, that Congress was using "determination" in such an extended and informal sense. Indeed, at least one related statutory provision suggests just the opposite. Section 1255a(f)(3)(B) limits administrative appellate review to "the administrative record established at the time of the determination on the application"; because there obviously can be no administrative record in the case of a front-desked application, the term "determination" is best read to exclude front-desking. Thus, just as we avoided an interpretation of 8 U. S. C. § 1160(e) in *McNary* that would have amounted to "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims," *McNary, supra*, at 497, so here we avoid an interpretation of § 1255a(f)(1) that would bar front-desked applicants from ever obtaining judicial review of the regulations that rendered them ineligible for legalization.

Unfortunately, however, neither the *CSS* record nor the *LULAC* record contains evidence that particular class members were actually subjected to front-desking. None of the named individual plaintiffs in either case alleges that he or

she was front-desked,[25] and while a number of affidavits in the *LULAC* record contain the testimony of immigration attorneys and employees of interested organizations that the INS has "refused," "rejected," or "den[ied] individuals the right to file" applications,[26] the testimony is limited to such general assertions; none of the affiants refers to any specific incident that we can identify as an instance of front-desking.[27]

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[25] In *LULAC*, the one named individual plaintiff who represents the subclass challenging the INS's original "facially-valid document" policy never attempted to file an application, because he was advised by an attorney over the telephone that he was ineligible. See *LULAC*, First Amended Complaint 11–12 (Record, Doc. No. 56) (describing plaintiff John Doe). In *CSS*, none of the named plaintiffs challenging the "advance parole" regulation allege that they attempted to file applications. See *CSS* Sixth Amended Complaint 12–18 (Record, Doc. No. 140).

[26] See App. 204 (affidavit of Pilar Cuen) (legalization counselor states that "INS has refused applications for legalization because our clients entered after January 1, 1982 with a non-immigrant visa and an I–94 was issued at the time of reentry"); App. 209 (affidavit of Joanne T. Stark) (immigration lawyer in private practice states that she is "aware that the Service has discouraged application in the past by [*LULAC* class members] or has rejected applications made"); Record, Doc. No. 16, Exh. H, p. 135 (affidavit of Isabel Garcia Gallegos) (immigration attorney states that "the legalization offices in Southern Arizona [have] rejected, and otherwise, discouraged individuals who had, in fact entered the United States with an I–94 after January 1, 1982"); App. 200 (affidavit of Marc Van Der Hout) (immigration attorney states that "[i]t has been the practice of the San Francisco District legalization office to deny individuals the right to file an application for legalization under the [Reform Act] if the individual had been in unlawful status prior to January 1, 1982, departed the United States post January 1, 1982, and re-entered on a non-immigrant visa").

[27] Only one affiant refers to a specific incident. He recounts: "[I]n August [1987] I was at the San Francisco legalization office when an individual came in seeking to apply for legalization. She was met at the reception desk by a clerk and when she explained the facts of her case, [that she had departed and re-entered the United States after January 1, 1982, on a non-immigrant visa], she was told that she did not qualify for legalization and could not file." App. 200–201 (affidavit of Marc Van Der Hout). The significance of this incident is unclear, however, since there is no way

This lack of evidence precludes us from resolving the jurisdictional issue here, because, on the facts before us, the front-desking of a particular class member is not only sufficient to make his legal claims ripe, but necessary to do so. As the case has been presented to us, there seems to be no reliable way of determining whether a particular class member, had he applied at all (which, we assume, he did not), would have applied in a manner that would have subjected him to front-desking. As of October 16, 1987, the INS had certified 977 Qualified Designated Entities which could have aided class members in preparing applications that would not have been front-desked, see 52 Fed. Reg. 44812 (1987); n. 21, *supra*, and there is no prior history of application behavior on the basis of which we could predict who would have applied without Qualified Designated Entity assistance and therefore been front-desked. Hence, we cannot say that the mere existence of a front-desking policy involved a "concrete application" of the invalid regulations to those class members who were not actually front-desked.[28] Because only those class members (if any) who were front-desked have ripe claims over which the District Courts should exercise jurisdiction, we must vacate the judgment of the Court of Appeals, and remand with directions to remand to the respec-

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of telling whether this individual was a *LULAC* class member (that is, whether she would otherwise have been eligible for legalization), nor whether she had a completed application ready for filing and payment in hand.

[28] The record reveals relatively little about the application of the front-desking policy and surrounding circumstances. Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure to apply, so that they can be said to have had the "advanced parole" or "facially valid document" regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns.

tive District Courts for proceedings to determine which class members were front-desked.[29]

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the District Courts in these two cases, *Reno* v. *Catholic Social Services, Inc. (CSS)*, and *INS* v. *League of United Latin American Citizens (LULAC)*, erred in extending the application period for legalization beyond May 4, 1988, the end of the 12-month interval specified by the Immigration Reform and Control Act of 1986. I would not, however, reach this result on ripeness grounds. The Court holds that a member of the plaintiff class in *CSS* or *LULAC* who failed to apply to the INS during the 12-month period does not now have a ripe claim to extend the application deadline. In my view, that claim *became ripe* after May 4, 1988, even if it was not ripe before. The claim may well lack merit, but it is no longer premature.

The Court of Appeals did not consider the problem of ripeness, and the submissions to this Court have not discussed

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[29] Although we do not reach the question of remedy on this disposition of the case, we note that, by definition, each *CSS* and *LULAC* class member who was front-desked presented at an INS office to an INS employee an application that under the terms of the Reform Act (as opposed to the terms of the invalid regulation) entitled him to an adjustment of status. Under any reasonable interpretation of the word, such an individual "applied" for an adjustment of status within the 12-month period under § 1255a(a)(1)(A). Because that individual timely applied, the INS need only readjudicate the application, and grant the individual the relief to which he is entitled. Since there is no statutory deadline for processing the applications, and since a front-desked individual need not await a deportation order before obtaining judicial review, there is no reason to think that a district court would lack the power to order such relief.

that problem except in passing. See Pet. for Cert. 11, n. 13; Brief for Petitioners 20; Brief for Respondents 17, n. 23. Rather, certiorari was granted on two questions, to which the parties rightly have adhered: first, whether the District Courts had jurisdiction under 8 U. S. C. § 1255a(f), the judicial-review provision of Title II of the Reform Act; and second, whether the courts properly extended the application period. See Pet. for Cert. I. The Court finds the jurisdictional challenge meritless under *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), see *ante*, at 53–56, as do I. But instead of proceeding to consider the second question presented, the Court *sua sponte* attempts to resolve the case on ripeness grounds. It reaches out to hold that "the promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." *Ante*, at 59. This is new and, in my view, incorrect law. Moreover, even if it *is* correct, the new ripeness doctrine propounded by the Court is irrelevant to the case at hand.

Our prior cases concerning anticipatory challenges to agency rules do not specify when an anticipatory suit may be brought against a benefit-conferring rule, such as the INS regulations here. An anticipatory suit by a would-be beneficiary, who has not yet applied for the benefit that the rule denies him, poses different ripeness problems than a pre-enforcement suit against a duty-creating rule, see *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–156 (1967) (permitting pre-enforcement suit). Even if he succeeds in his anticipatory action, the would-be beneficiary will not receive the benefit until he actually applies for it; and the agency might then deny him the benefit on grounds other than his ineligibility under the rule. By contrast, a successful suit against the duty-creating rule will relieve the plaintiff immediately of a burden that he otherwise would bear.

Yet I would not go so far as to state that a suit challenging a benefit-conferring rule is necessarily unripe simply because the plaintiff has not yet applied for the benefit. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974). If it is "inevitable" that the challenged rule will "operat[e]" to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may well be a justiciable controversy that the court may find prudent to resolve.

I do not mean to suggest that a simple anticipatory challenge to the INS regulations would be ripe under the approach I propose. Cf. *ante*, at 58–59, n. 19. That issue need not be decided because, as explained below, these cases are *not* a simple anticipatory challenge. See *infra*, at 71–74. My intent is rather to criticize the Court's reasoning—its reliance on a categorical rule that would-be beneficiaries cannot challenge benefit-conferring regulations until they apply for benefits.

Certainly the line of cases beginning with *Abbott Laboratories* does not support this categorical approach. That decision itself discusses with approval an earlier case that involved an anticipatory challenge to a benefit-conferring rule.

> "[I]n *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, the Court held to be a final agency action . . . an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant already owning five such licenses, *even though no specific application was before the Commission.*" 387 U. S., at 151 (emphasis added).

More recently, in *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64 (1980), the Court held that a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance." *Id.*, at 72, n. 12. And in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983), the Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the utilities had not yet applied for a certificate. See *id.*, at 200–202. To be sure, all of these decisions involved licenses, certificates, or variances, which exempt the bearer from otherwise-applicable duties; but the same is true of the instant cases. The benefit conferred by the Reform Act—an adjustment in status to lawful temporary resident alien, see 8 U. S. C. § 1255a(a)—readily can be conceptualized as a "license" or "certificate" to remain in the United States, or a "variance" from the immigration laws.

As for *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990), the Court there stated:

> "Absent [explicit statutory authorization for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided.)" *Id.*, at 891–892 (citations omitted).

This language does not suggest that an anticipatory challenge to a benefit-conferring rule will of necessity be constitutionally unripe, for otherwise an "explicit statutory review" provision would not help cure the ripeness problem. Rather, *Lujan* points to the prudential considerations that weigh in the ripeness calculus: the need to "flesh[h] out" the controversy and the burden on the plaintiff who must "adjust his conduct immediately." These are just the kinds of factors identified in the two-part, prudential test for ripeness that *Abbott Laboratories* articulated. "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U. S., at 149. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 581–582 (1985) (relying upon *Abbott Laboratories* test); *Pacific Gas*, *supra*, at 200–203 (same); *National Crushed Stone*, *supra*, at 72–73, n. 12 (same). At the very least, where the challenge to the benefit-conferring rule is purely legal, and where the plaintiff will suffer hardship if he cannot raise his challenge until later, a justiciable, anticipatory challenge to the rule may well be ripe in the prudential sense. Thus I cannot agree with the Court that ripeness will never obtain until the plaintiff actually applies for the benefit.

But this new rule of ripeness law, even if correct, is irrelevant here. These cases no longer fall in the above-described category of anticipatory actions, where a would-be beneficiary simply seeks to invalidate a benefit-conferring rule before he applies for benefits. As the cases progressed in the District Courts, respondents amended their complaints to request an additional remedy beyond the invalidation of the INS regulations: an extension of the 12-month application period. Compare Sixth Amended Complaint in *CSS* (Record, Doc. No. 140) and First Amended Complaint in *LULAC* (Record, Doc. No. 56) with Third Amended Complaint in *CSS* (Record, Doc. No. 69) and Complaint in *LULAC* (Record,

Doc. No. 1). That period expired on May 4, 1988, and the District Courts *thereafter* granted an extension. See App. to Pet. for Cert. 22a–28a, 50a–60a (orders dated June and August 1988). The only issue before us is whether these orders should have been entered. See *ante*, at 48–49, 52–53. Even if the Court is correct that a plaintiff cannot seek to invalidate an agency's benefit-conferring rule before applying to the agency for the benefit, it is a separate question whether the would-be beneficiary must make the wholly futile gesture of submitting an application *when the application period has expired and he is seeking to extend it.*

In the instant cases, I do not see why a class member who failed to apply to the INS within the 12-month period lacks a ripe claim to extend the application deadline, now that the period actually has expired. If Congress in the Reform Act had provided for an 18-month application period, and the INS had closed the application period after only 12 months, no one would argue that court orders extending the period for 6 more months should be vacated on ripeness grounds. The orders actually before us are not meaningfully distinguishable. Of course, respondents predicate their argument for extending the period on the invalidity of the INS regulations, see *infra*, at 75–77, not on a separate statutory provision governing the length of the period, but this difference does not change the ripeness calculus. The "basic rationale" behind our ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," when those "disagreements" are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Union Carbide, supra*, at 580–581 (internal quotation marks omitted). There is no contingency to the closing of the 12-month application period. It is *certain* that an alien who now applies to the INS for legalization will be denied that benefit because the period has closed. Nor does prudence justify this Court in postponing an alien's claim to extend the period, since that

claim is purely legal and since a delayed opportunity to seek legalization will cause grave uncertainty.

The Court responds to this point by reiterating that class members who failed to apply to the INS have not yet suffered a "concrete" injury, because the INS has not denied them legalization by virtue of the challenged regulations. See *ante*, at 59–60, n. 20. At present, however, class members are seeking to redress a different, and logically prior, injury: the denial of the very opportunity to apply for legalization.

The Court's ripeness analysis focuses on the wrong question: whether "the *promulgation* of the challenged regulations [gave] each *CSS* and *LULAC* class member a ripe claim." *Ante*, at 59 (emphasis added). But the question is not whether the class members' claims were ripe *at the inception of these suits*, when respondents were seeking simply to invalidate the INS regulations and the 12-month application period had not yet closed. Whatever the initial status of those claims, they became ripe once the period had in fact closed and respondents had amended their complaints to seek an extension. In the *Regional Rail Reorganization Act Cases*, this Court held that "since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." 419 U. S., at 140. Accord, *Buckley* v. *Valeo*, 424 U. S. 1, 114–118 (1976) *(per curiam)*. Similarly, in the cases before us, it is the situation now (and, as it happens, at the time of the District Courts' orders), rather than at the time of the initial complaints, that must govern.

The Court also suggests that respondents' claim to extend the application period may well be "flatly" barred by 8 U. S. C. § 1255a(f)(2), which provides: "No denial of adjustment of status [under Title II of the Reform Act] based on a late filing of an application for such adjustment may be reviewed by [any] court . . . ." See *ante*, at 60, n. 20. I find it remarkable that the Court might construe § 1255a(f)(2) as barring *any* suit seeking to extend the application dead-

line set by the INS, while at the same time interpreting § 1255a(f)(1) *not* to bar respondents' substantive challenge to the INS regulations, see *ante*, at 53–56. As the INS itself observes, the preclusive language in § 1255a(f)(1) is "broader" than in § 1255a(f)(2), because the latter provision uses the word "denial" instead of "determination." See Brief for Petitioners 19. If Congress in the Reform Act had provided for an 18-month application period, and the INS had closed the period after only 12 months, I cannot believe that § 1255a(f)(2) would preclude a suit seeking to extend the period by 6 months. Nor do I think that § 1255a(f)(2) bars respondents' claim to extend the period, because that claim is predicated on their substantive challenge to the INS regulations, which in turn is permitted by § 1255a(f)(1). In any event, § 1255a(f)(2) concerns reviewability, not ripeness; whether or not that provision precludes the instant actions, the Court's ripeness analysis remains misguided.

Of course, the closing of the application period was not an unalloyed benefit for class members who had failed to apply. After May 4, 1988, those aliens had ripe claims, but they also became statutorily ineligible for legalization. The Reform Act authorizes the INS to adjust the status of an illegal alien only if he "appl[ies] for such adjustment during the 12-month period beginning on a date . . . designated by the Attorney General." 8 U. S. C. § 1255a(a)(1)(A). As the INS rightly argues, this provision precludes the legalization of an alien who waited to apply until after the 12-month period had ended. The District Courts' orders extending the application period were not unripe, either constitutionally or prudentially, but they *were* impermissible under the Reform Act. "A court is no more authorized to overlook the valid [requirement] that applications be [submitted] than it is to overlook any other valid requirement for the receipt of benefits." *Schweiker* v. *Hansen*, 450 U. S. 785, 790 (1981) *(per curiam)*.

Respondents assert that equity requires an extension of the time limit imposed by § 1255a(a)(1)(A). Whether that provision is seen as a limitations period subject to equitable tolling, see *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990), or as a substantive requirement subject perhaps to equitable estoppel, see *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 419–424 (1990), the District Courts needed some special reason to exercise that equitable power against the United States. The only reason respondents adduce is supposed "affirmative misconduct" by the INS. See *Irwin, supra*, at 96 ("We have allowed equitable tolling in situations . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Richmond, supra*, at 421 ("Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of 'affirmative misconduct' might give rise to estoppel against the Government"). Respondents argue that the INS engaged in "affirmative misconduct" by promulgating the invalid regulations, which deterred aliens who were ineligible under those regulations from applying for legalization. See Plaintiffs' Submission Re Availability of Remedies for the Plaintiff Class in *CSS*, pp. 6–15 (Record, Doc. No. 164), Plaintiffs' Memorandum on Remedies in *LULAC* (Record, Doc. No. 40). The District Courts essentially accepted the argument, ordering remedies coextensive with the INS' supposed "misconduct." The *CSS* court extended the application period for those class members who "knew of [the INS'] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," App. to Pet. for Cert. 25a; the *LULAC* court provided an almost identical remedy, see *id.*, at 59a.

I cannot agree that a benefit-conferring agency commits "affirmative misconduct," sufficient to justify an equitable extension of the statutory time period for application, simply

by promulgating a regulation that incorrectly specifies the eligibility criteria for the benefit. When Congress passes a benefits statute that includes a time period, it has two goals. It intends *both* that eligible claimants receive the benefit *and* that they promptly assert their claims. The broad definition of "misconduct" that respondents propose would give the first goal absolute priority over the second, but I would not presume that Congress intends such a prioritization. Rather, absent evidence to the contrary, Congress presumably intends that the two goals be harmonized as best possible, by requiring would-be beneficiaries to make a timely application *and* concurrently to contest the invalid regulation. "We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin*, *supra*, at 96. The broad equitable remedy entered by the District Courts in these cases is contrary to Congress' presumptive intent in the Reform Act, and thus is error. "'Courts of equity can no more disregard statutory . . . requirements and provisions than can courts of law.'" *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893)).

I therefore agree with the Court that the District Courts' orders extending the application period must be vacated. I also agree that "front-desked" aliens already have "applied" within the meaning of § 1255a(a)(1)(A). See *ante*, at 67, n. 29. On remand, respondents may be able to demonstrate particular instances of "misconduct" by the INS, beyond the promulgation of the invalid regulations, that might perhaps justify an extension for certain members of the *LULAC* class or the *CSS* class. See Brief for Respondents 16–20, 35–42. I would not preclude the possibility of a narrower order requiring the INS to adjudicate the applications of both "front-desked" aliens and some aliens who were not "front-desked," but neither would I endorse that possibility, because at this

point respondents have made only the most general suggestions of "misconduct."

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

After Congress authorized a major amnesty program in 1986, the Government promulgated two regulations severely restricting access to that program. If valid, each regulation would have rendered ineligible for amnesty the members of the respective classes of respondents in this case. The Government, of course, no longer defends either regulation. See *ante*, at 48, 52. Nevertheless, one of the regulations was in effect for all but 12 days of the period in which applications for legalization were accepted; the other, for over half of that period. See *ante*, at 48, 50–51. Accordingly, after holding the regulations invalid, the District Courts entered orders extending the time for filing applications for certain class members. See *ante*, at 48–49, 52.

On appeal, the Government argued that the District Courts lacked jurisdiction both to entertain the actions and to provide remedies in the form of extended application periods. The Court of Appeals rejected the first argument on the authority of our decision in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991). *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F. 2d 914, 919–921 (CA9 1992). As the Court holds today, *ante*, at 53–56, that ruling was plainly correct. The Court of Appeals also correctly rejected the second argument advanced by the Government, noting that extension of the filing deadline effectuated Congress' intent to provide "meaningful opportunities to apply for adjustments of status," which would otherwise have been frustrated by enforcement of the invalid regulations. 956 F. 2d, at 921–922. We should, accordingly, affirm the judgment of the Court of Appeals.

This Court, however, finds a basis for prolonging the litigation on a theory that was not argued in either the District

Courts or the Court of Appeals, and was barely mentioned in this Court: that respondents' challenges are not, for the most part, "ripe" for adjudication. *Ante*, at 57–61. I agree with JUSTICE O'CONNOR, *ante*, p. 67 (opinion concurring in judgment), that the Court's rationale is seriously flawed. Unlike JUSTICE O'CONNOR, however, see *ante*, at 73, I have no doubt that respondents' claims were ripe as soon as the concededly invalid regulations were promulgated.

Our test for ripeness is two pronged, "requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967). Whether an issue is fit for judicial review, in turn, often depends on "the degree and nature of [a] regulation's present effect on those seeking relief," *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 164 (1967), or, put differently, on whether there has been some "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him," *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 891 (1990). As JUSTICE O'CONNOR notes, we have returned to this two-part test for ripeness time and again, see *ante*, at 71, and there is no question but that the *Abbott Laboratories* formulation should govern this case.

As to the first *Abbott Laboratories* factor, I think it clear that the challenged regulations have an impact on respondents sufficiently "direct and immediate," 387 U. S., at 152, that they are fit for judicial review. My opinion rests, in part, on the unusual character of the amnesty program in question. As we explained in *McNary:*

> "The Immigration Reform and Control Act of 1986 (Reform Act) constituted a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States. . . . [I]n recognition that a large segment of the shadow population played a

> useful and constructive role in the American economy, but continued to reside in perpetual fear, the Reform Act established two broad amnesty programs to allow existing undocumented aliens to emerge from the shadows." 498 U. S., at 481–483 (footnotes omitted).[1]

A major purpose of this ambitious effort was to eliminate the fear in which these immigrants lived, "'afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.'" *Ayuda, Inc.* v. *Thornburgh*, 292 U. S. App. D. C. 150, 168, 948 F. 2d 742, 760 (1991) (Wald, J., dissenting) (quoting H. R. Rep. No. 99–682, pt. 1, p. 49 (1986)). Indeed, in recognition of this fear of governmental authority, Congress established a special procedure through which "qualified designated entities," or "QDE's," would serve as a channel of communication between undocumented aliens and the INS, providing reasonable assurance that "emergence from the shadows" would result in amnesty and not deportation. 8 U. S. C. § 1255a(c)(2); see *Ayuda*, 292 U. S. App. D. C., at 168, and n. 1, 948 F. 2d, at 760, and n. 1.

Under these circumstances, official advice that specified aliens were ineligible for amnesty was certain to convince those aliens to retain their "shadow" status rather than come forward. At the moment that decision was made—at the moment respondents conformed their behavior to the invalid regulations—those regulations concretely and directly affected respondents, consigning them to the shadow world from which the Reform Act was designed to deliver them, and threatening to deprive them of the statutory entitlement that would otherwise be theirs.[2] Cf. *Lujan*, 497 U. S., at 891 (concrete application threatening harm as basis for ripeness).

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[1] This case involves the first, and more important, of the two amnesty programs; *McNary* involved the second.

[2] As the majority explains, the classes certified in both actions were limited to persons otherwise eligible for legalization. See *ante*, at 47–48, 51.

The majority concedes, of course, that class members whose applications were "front-desked" felt the effects of the invalid regulations concretely, because their applications were "blocked then and there." See *ante*, at 63. Why "then and there," as opposed to earlier and elsewhere, should be dispositive remains unclear to me; whether a potential application is thwarted by a front-desk Legalization Assistant, by advice from a QDE, by consultation with a private attorney, or even by word of mouth regarding INS policies, the effect on the potential applicant is equally concrete, and equally devastating. In my view, there is no relevant difference, for purposes of ripeness, between respondents who were "front-desked" and those who can demonstrate, like the *LULAC* class, that they "'learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply,'" *ante*, at 51, or, like the class granted relief in *CSS*, that they "'knew of [the INS'] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application,'" *ante*, at 48–49. As Judge Wald explained in *Ayuda:*

> "[T]he majority admits that if low level INS officials had refused outright to accept legalization applications for filing, the district court could hear the suit. Even if the plaintiffs' affidavits are read to allege active discouragement rather than outright refusal to accept, this is a subtle distinction indeed, and one undoubtedly lost on the illegal aliens involved, upon which to grant or deny jurisdiction to challenge the practice." 292 U. S. App. D. C., at 169, n. 3, 948 F. 2d, at 761, n. 3 (dissenting opinion) (citation omitted).

The second *Abbott Laboratories* factor, which focuses on the cost to the parties of withholding judicial review, also weighs heavily in favor of ripeness in this case. Every day during which the invalid regulations were effective meant

another day spent in the shadows for respondents, with the attendant costs of that way of life. See *supra*, at 78–79. Even more important, with each passing day, the clock on the application period continued to run, increasing the risk that review, when it came, would be meaningless because the application period had already expired. See *Ayuda*, 292 U. S. App. D. C., at 178, 948 F. 2d, at 770 (Wald, J., dissenting).[3] Indeed, the dilemma respondents find themselves in today speaks volumes about the costs of deferring review in this situation. Cf. *Toilet Goods Assn.*, 387 U. S., at 164 (challenge not ripe where "no irremediable adverse consequences flow from requiring a later challenge").

Under *Abbott Laboratories*, then, I think it plain that respondents' claims were ripe for adjudication at the time they were filed. The Court's contrary holding, which seems to rest on the premise that respondents cannot challenge a condition of legalization until they have satisfied all other conditions, see *ante*, at 58–59, is at odds not only with our ripeness case law, but also with our more general understanding of the way in which government regulation affects the regulated. In *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993), for instance, we held that a class of contractors could challenge an ordinance making it more difficult for them to compete for public business without making any showing that class members were actually in a position to receive such business,

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[3] "Absent judicial action, the period for filing for IRCA legalization would have ended and thousands of persons would have lost their chance for amnesty. In purely human terms, it is difficult—perhaps impossible—for those of us fortunate enough to have been born in this country to appreciate fully the value of that lost opportunity. For undocumented aliens, IRCA offered a one-time chance to come out of hiding, to stop running, to 'belong' to America. The hardship of withholding judicial review is as severe as any that I have encountered in more than a decade of administrative review." 292 U. S. App. D. C., at 178, 948 F. 2d, at 770 (Wald, J., dissenting).

absent the challenged regulation. We announced the following rule:

> "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*, at 666.[4]

Our decision in the *Jacksonville* case is well supported by precedent; the Court's ripeness holding today is notable for its originality.

Though my approach to the ripeness issue differs from that of JUSTICE O'CONNOR, we are in agreement in concluding that respondents' claims are ripe for adjudication. We also agree that the validity of the relief provided by the District Courts, in the form of extended application periods, turns on whether that remedy is consistent with congressional intent. See *ante*, at 76 (opinion concurring in judgment); *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 557–558 (1974) (equitable relief must be "consonant with the legislative scheme"); *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982) (courts retain broad equity powers to enter remedial orders absent clear statutory restriction); *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (courts of equity bound by statutory requirements). Where I differ from

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[4] *Jacksonville* is, of course, an equal protection case, while respondents in this case are seeking a statutory benefit. If this distinction has any relevance to a ripeness analysis, then it should mitigate in favor of finding ripeness here; I assume we should be more reluctant to overcome jurisdictional hurdles to decide constitutional issues than to effectuate statutory programs.

JUSTICE O'CONNOR is in my determination that extensions of the application period in this case were entirely consistent with legislative intent, and hence well within the authority of the District Courts.

It is no doubt true that "[w]hen Congress passes a benefits statute that includes a time period, it has two goals." See *ante*, at 76 (opinion concurring in judgment). Here, Congress' two goals were finality in its one-time amnesty program, and the integration of productive aliens into the American mainstream. See *Perales* v. *Thornburgh*, 967 F. 2d 798, 813 (CA2 1992). To balance both ends, and to achieve each, Congress settled on a 12-month application period. Twelve months, Congress determined, would be long enough for frightened aliens to come to understand the program and to step forward with applications, especially when the full period was combined with the special outreach efforts mandated by the Reform Act. *Ibid.*; see 8 U. S. C. § 1255a(i) (requiring broad dissemination of information about amnesty program); § 1255a(c)(2) (establishing QDE's). The generous 12-month period would also serve the goal of finality, by "'ensur[ing] true resolution of the problem and . . . that the program will be a one-time-only program.'" 967 F. 2d, at 813 (quoting H. R. Rep. No. 99–682, pt. 1, at 72.

The problem, of course, is that the full 12-month period was never made available to respondents. For the *CSS* class, the 12-month period shrank to precisely 12 days during which they were eligible for legalization; for the *LULAC* class, to roughly 5 months. See *supra*, at 77. Accordingly, congressional intent required an extension of the filing deadline, in order to make effective the 12-month application period critical to the balance struck by Congress. See 956 F. 2d, at 922; *Perales*, 967 F. 2d, at 813.

That congressional intent is furthered, not frustrated, by the equitable relief granted here distinguishes this case from *Pangilinan*, in which we held that a court lacked the authority to order naturalization for certain persons after expira-

tion of a statutory deadline. 486 U. S., at 882–885. In *Pangilinan*, we were faced with a "congressional command [that] could not be more manifest" specifically precluding the relief granted. *Id.*, at 884. The Reform Act, on the other hand, contains no such explicit limitation.[5] Indeed, the Reform Act does not itself contain a statutory deadline at all, leaving it largely to the Attorney General to delineate a 12-month period. 8 U. S. C. § 1255a(a)(1)(A). This delegation highlights the relative insignificance to Congress of the application cutoff date, as opposed to the length of the application period itself. See *Perales*, 967 F. 2d, at 813, n. 4.

Finally, I can see no reason to limit otherwise available relief to those class members who experienced "front-desking," on the theory that they have "applied" for legalization. Cf. *ante*, at 67, n. 29; *ante*, at 76–77 (O'CONNOR, J., concurring in judgment). It makes no sense to condition relief on the filing of a futile application. Indeed, we have already rejected the proposition that such an application is necessary for receipt of an equitable remedy. In *Teamsters* v. *United States*, 431 U. S. 324 (1977), a case involving discriminatory employment practices under Title VII of the Civil Rights Act of 1964, we held that those who had been deterred from applying for jobs by an employer's practice of rejecting applicants like themselves were eligible for relief along with those who had unsuccessfully applied. We reasoned:

> "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

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[5] There is no language in the Reform Act prohibiting an extension of the application period. Section 1255a(f)(2), relied on by the Government, see Brief for Petitioners 28–29, precludes review of *individual* late-filed applications; like § 1255a(f)(1), it has no bearing on the kind of broad-based challenge and remedy at issue here. See *ante*, at 55, and n. 17; *ante*, at 73–74 (O'CONNOR, J., concurring in judgment).

> ". . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U. S., at 365–366.

The same intelligent principle should control this case. A respondent who can show that she would have applied for legalization but for the invalid regulations is "in a position analogous to that of an applicant," and entitled to the same relief. See *id.*, at 368.

In my view, then, the Court of Appeals was correct on both counts when it affirmed the District Court orders in this case: Respondents' claims were justiciable when filed, and the relief ordered did not exceed the authority of the District Courts. Accordingly, I respectfully dissent.

Syllabus

HARPER ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 91–794. Argued December 2, 1992—Decided June 18, 1993

In *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, this Court invalidated Michigan's practice of taxing retirement benefits paid by the Federal Government while exempting retirement benefits paid by the State or its political subdivisions. Because Michigan conceded that a refund to federal retirees was the appropriate remedy, the Court remanded for entry of judgment against the State. Virginia subsequently amended a similar statute that taxed federal retirees while exempting state and local retirees. Petitioners, federal civil service and military retirees, sought a refund of taxes assessed by Virginia before the revision of this statute. Applying the factors set forth in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107, a state trial court denied relief to petitioners as to all taxable events occurring before *Davis* was decided. In affirming, the Virginia Supreme Court concluded that *Davis* should not be applied retroactively under *Chevron Oil* and *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (plurality opinion). It also held, as matters of state law, that the assessments were neither erroneous nor improper and that a decision declaring a tax scheme unconstitutional has solely prospective effect. In *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, however, six Members of this Court required the retroactive application of *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263—which prohibited States from imposing higher excise taxes on imported alcoholic beverages than on locally produced beverages—to claims arising from facts predating that decision. Those Justices disagreed with the Georgia Supreme Court's use of *Chevron Oil*'s retroactivity analysis. After this Court ordered reevaluation of petitioners' suit in light of *Beam*, the Virginia Supreme Court reaffirmed its decision in all respects. It held that *Beam* did not foreclose the use of *Chevron Oil*'s analysis because *Davis* did not decide whether its rule applied retroactively.

Held:

1. When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. Pp. 94–99.

Syllabus

(a) This rule fairly reflects the position of a majority of Justices in *Beam* and extends to civil cases the ban against "selective application of new rules" in criminal cases. *Griffith* v. *Kentucky*, 479 U. S. 314, 323. Mindful of the "basic norms of constitutional adjudication" animating the Court's view of retroactivity in criminal cases, *id.*, at 322—that the nature of judicial review strips the Court of the quintessentially legislative prerogative to make rules of law retroactive or prospective as it sees fit and that selective application of new rules violates the principle of treating similarly situated parties the same, *id.*, at 322, 323—the Court prohibits the erection of selective temporal barriers to the application of federal law in noncriminal cases. When the Court does not reserve the question whether its holding should be applied to the parties before it, the opinion is properly understood to have followed the normal rule of retroactive application, *Beam*, 501 U. S., at 540 (opinion of SOUTER, J.), and the legal imperative to apply such a rule prevails "over any claim based on a *Chevron Oil* analysis," *ibid.* Pp. 94–98.

(b) This Court applied the rule of law announced in *Davis* to the parties before the Court. The Court's response to Michigan's concession that a refund would be appropriate in *Davis*, far from reserving the retroactivity question, constituted a retroactive application of the rule. A decision to accord solely prospective effect to *Davis* would have foreclosed any discussion of remedial issues. Pp. 98–99.

2. The decision below does not rest on independent and adequate state-law grounds. In holding that state-law retroactivity doctrine permitted the solely prospective application of the ruling, the State Supreme Court simply incorporated into state law the analysis of *Chevron Oil* and criminal retroactivity cases overruled by *Griffith*. The Supremacy Clause, however, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Similarly, the state court's conclusion that the challenged assessments were not erroneous or improper under state law rested solely on its determination that *Davis* did not apply retroactively. Pp. 99–100.

3. Virginia is free to choose the form of relief it will provide, so long as that relief is consistent with federal due process principles. A State retains flexibility in responding to the determination that it has imposed an impermissibly discriminatory tax. The availability of a predeprivation hearing constitutes a procedural safeguard sufficient to satisfy due process, but if no such relief exists, the State must provide meaningful backward-looking relief either by awarding full refunds or by issuing some other order that creates in hindsight a nondiscriminatory scheme. Since any remedy's constitutional sufficiency turns (at least initially) on whether Virginia law provides an adequate form of predeprivation proc-

Syllabus

ess, and since that issue has not been properly presented, this question and the performance of other tasks pertaining to the crafting of an appropriate remedy are left to the Virginia courts. Pp. 100–102.

242 Va. 322, 410 S. E. 2d 629, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined, and in Parts I and III of which WHITE and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 102. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE, J., joined, *post*, p. 110. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 113.

Michael J. Kator argued the cause and filed the briefs for petitioners.

Gail Starling Marshall argued the cause for respondent. With her on the brief were *Mary Sue Terry*, Attorney General of Virginia, *Stephen D. Rosenthal*, Chief Deputy Attorney General, *Gregory E. Lucyk* and *N. Pendleton Rogers*, Senior Assistant Attorneys General, *Barbara H. Vann*, Assistant Attorney General, and *Peter W. Low*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas by *Winston Bryant*, Attorney General of Arkansas, and *Joyce Kinkead;* for the State of Georgia by *Michael J. Bowers*, Attorney General of Georgia, and *Warren R. Calvert* and *Daniel M. Formby*, Senior Assistant Attorneys General; for the State of North Carolina et al. by *Lacy H. Thornburg*, Attorney General of North Carolina, *Edwin M. Speas, Jr.*, Senior Deputy Attorney General, *H. Jefferson Powell*, *Norma S. Harrell* and *Thomas F. Moffitt*, Special Deputy Attorneys General, *Marilyn R. Mudge*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, *Rebecca White Berch*, and *Gail H. Boyd*, Assistant Attorney General; for the State of Utah et al. by *Paul Van Dam*, Attorney General of Utah, *Leon A. Dever*, Assistant Attorney General, *James H. Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Tautai A. F. Fa'Alevao*, Attorney General of American Samoa, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *John Payton*, Corporate Counsel of the District of Columbia, *Warren Price III*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Chris Gorman*, Attorney General of Kentucky, *Michael*

JUSTICE THOMAS delivered the opinion of the Court.

In *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), we held that a State violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions. Relying on the retroactivity analysis of *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), the Supreme Court of Virginia twice refused to apply *Davis* to

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E. Carpenter, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Michael C. Moore*, Attorney General of Mississippi, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lee Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *Charles S. Crookham*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Jorge Perez-Diaz*, Attorney General of Puerto Rico, *James E. O'Neil*, Attorney General of Rhode Island, *A. Crawford Clarkson, Jr.*, *Mark Barnett*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Dan Morales*, Attorney General of Texas, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Rosalie Simmonds Ballentine*, Attorney General of the Virgin Islands, *Kenneth O. Eikenberry*, Attorney General of Washington, *Mario J. Palumbo*, Attorney General of West Virginia, *Joseph B. Meyer*, Attorney General of Wyoming, and *James E. Doyle, Jr.*, Attorney General of Wisconsin; for the city of New York by *O. Peter Sherwood*, *Edward F. X. Hart*, and *Stanley Buchsbaum;* and for the National Governors' Association et al. by *Richard Ruda* and *Charles Rothfeld.*

Briefs of *amici curiae* were filed for Designated Federal Retirees in Kansas et al. by *John C. Frieden*, *Kevin M. Fowler*, *Kenton C. Granger*, *Roger M. Theis*, *Carrold E. Ray*, *G. Eugene Boyce*, *Donald L. Smith*, *Edmund F. Sheehy, Jr.*, *Brian A. Luscher*, *Gene M. Connell, Jr.*, and *J. Doyle Fuller;* for James B. Beam Distilling Co. by *Morton Siegel*, *Michael A. Moses*, *Richard G. Schoenstadt*, *James L. Webster*, and *John L. Taylor, Jr.;* for the Military Coalition by *Eugene O. Duffy;* and for the Virginia Manufacturers Association by *Walter A. Smith, Jr.*

taxes imposed before *Davis* was decided. In accord with *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), and *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991), we hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision. We therefore reverse.

I

The Michigan tax scheme at issue in *Davis* "exempt[ed] from taxation all retirement benefits paid by the State or its political subdivisions, but levie[d] an income tax on retirement benefits paid by . . . the Federal Government." 489 U. S., at 805. We held that the United States had not consented under 4 U. S. C. § 111[1] to this discriminatory imposition of a heavier tax burden on federal benefits than on state and local benefits. 489 U. S., at 808–817. Because Michigan "conceded that a refund [was] appropriate," we recognized that federal retirees were entitled to a refund of taxes "paid . . . pursuant to this invalid tax scheme." *Id.*, at 817.[2]

Like Michigan, Virginia exempted state and local employees' retirement benefits from state income taxation while taxing federal retirement benefits. Va. Code Ann. § 58.1–322(c)(3) (Supp. 1988). In response to *Davis*, Virginia repealed its exemption for state and local government employees. 1989 Va. Acts, Special Sess. II, ch. 3. It also enacted a special statute of limitations for refund claims made in light of *Davis*. Under this statute, taxpayers may seek a refund

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[1] "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U. S. C. § 111.

[2] We have since followed *Davis* and held that a State violates intergovernmental tax immunity and 4 U. S. C. § 111 when it "taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees." *Barker* v. *Kansas*, 503 U. S. 594, 596 (1992).

of state taxes imposed on federal retirement benefits in 1985, 1986, 1987, and 1988 for up to one year from the date of the final judicial resolution of whether Virginia must refund these taxes. Va. Code Ann. § 58.1–1823(b) (Supp. 1992).[3]

Petitioners, 421 federal civil service and military retirees, sought a refund of taxes "erroneously or improperly assessed" in violation of *Davis*' nondiscrimination principle. Va. Code Ann. § 58.1–1826 (1991). The trial court denied relief. Law No. CL891080 (Va. Cir. Ct., Mar. 12, 1990). Applying the factors set forth in *Chevron Oil Co.* v. *Huson*, *supra*, at 106–107,[4] the court reasoned that "*Davis* decided an issue of first impression whose resolution was not clearly foreshadowed," that "prospective application of *Davis* will not retard its operation," and that "retroactive application would result in inequity, injustice and hardship." App. to Pet. for Cert. 20a.

The Supreme Court of Virginia affirmed. *Harper* v. *Virginia Dept. of Taxation*, 241 Va. 232, 401 S. E. 2d 868 (1991). It too concluded, after consulting *Chevron* and the plurality opinion in *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990), that "the *Davis* decision is not to be applied retroactively." 241 Va., at 240, 401 S. E. 2d, at 873. The court also rejected petitioners' contention that "refunds

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[3] Applications for tax refunds generally must be made within three years of the assessment. Va. Code Ann. § 58.1–1825 (1991). As of the date we decided *Davis*, this statute of limitations would have barred all actions seeking refunds from taxes imposed before 1985.

[4] "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application . . . ." *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107 (citations omitted).

[were] due as a matter of state law." *Ibid.* It concluded that "because the *Davis* decision is not to be applied retroactively, the pre-*Davis* assessments were neither erroneous nor improper" under Virginia's tax refund statute. *Id.*, at 241, 401 S. E. 2d, at 873. As a matter of Virginia law, the court held, a "ruling declaring a taxing scheme unconstitutional is to be applied prospectively only." *Ibid.* This rationale supplied "another reason" for refusing relief. *Ibid.*

Even as the Virginia courts were denying relief to petitioners, we were confronting a similar retroactivity problem in *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991). At issue was *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), which prohibited States from imposing higher excise taxes on imported alcoholic beverages than on local products. The Supreme Court of Georgia had used the analysis described in *Chevron Oil Co.* v. *Huson* to deny retroactive effect to a decision of this Court. Six Members of this Court disagreed, concluding instead that *Bacchus* must be applied retroactively to claims arising from facts predating that decision. *Beam*, 501 U. S., at 532 (opinion of SOUTER, J.); *id.*, at 544–545 (WHITE, J., concurring in judgment); *id.*, at 547–548 (BLACKMUN, J., concurring in judgment); *id.*, at 548–549 (SCALIA, J., concurring in judgment). After deciding *Beam*, we vacated the judgment in *Harper* and remanded for further consideration. 501 U. S. 1247 (1991).

On remand, the Supreme Court of Virginia again denied tax relief. 242 Va. 322, 410 S. E. 2d 629 (1991). It reasoned that because Michigan did not contest the *Davis* plaintiffs' entitlement to a refund, this Court "made no . . . ruling" regarding the retroactive application of its rule "to the litigants in that case." 242 Va., at 326, 410 S. E. 2d, at 631. Concluding that *Beam* did not foreclose application of *Chevron*'s retroactivity analysis because "the retroactivity issue was not decided in *Davis*," 242 Va., at 326, 410 S. E. 2d, at

631, the court "reaffirm[ed] [its] prior decision in all respects," *id.*, at 327, 410 S. E. 2d, at 632.

When we decided *Davis*, 23 States gave preferential tax treatment to benefits received by employees of state and local governments relative to the tax treatment of benefits received by federal employees.[5] Like the Supreme Court of Virginia, several other state courts have refused to accord full retroactive effect to *Davis* as a controlling statement of federal law.[6] Two of the courts refusing to apply *Davis* retroactively have done so after this Court remanded for reconsideration in light of *Beam*. See *Bass* v. *South Carolina*, 501 U. S. 1246 (1991); *Harper* v. *Virginia Dept. of Taxation*, 501 U. S. 1247 (1991); *Lewy* v. *Virginia Dept. of Taxation*, decided with *Harper* v. *Virginia Dept. of Taxation*, 501 U. S. 1247 (1991). By contrast, the Supreme Court of Arkansas has concluded as a matter of federal law that *Davis* applies retroactively. *Pledger* v. *Bosnick*, 306 Ark. 45, 54–56, 811 S. W. 2d 286, 292–293 (1991), cert. pending, No. 91–375. Cf. *Reich* v. *Collins*, 262 Ga. 625, 422 S. E. 2d 846 (1992)

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[5] *E. g.*, Ala. Code § 36–27–28 (1991), Ala. Code § 40–18–19 (1985); Iowa Code § 97A.12 (1984), repealed, 1989 Iowa Acts, ch. 228, § 10 (repeal retroactive to Jan. 1, 1989); La. Rev. Stat. Ann. § 47:44.1 (West Supp. 1990); Miss. Code Ann. § 25–11–129 (1972); Mo. Rev. Stat. § 86.190 (1971), Mo. Rev. Stat. § 104.540 (1989); Mont. Code Ann. § 15–30–111(2) (1987); N. Y. Tax Law § 612(c)(3) (McKinney 1987); Utah Code Ann. § 49–1–608 (1989). See generally *Harper* v. *Virginia Dept. of Taxation*, 241 Va. 232, 237, n. 2, 401 S. E. 2d 868, 871, n. 2 (1991).

[6] *Bohn* v. *Waddell*, 167 Ariz. 344, 349, 807 P. 2d 1, 6 (Tax Ct. 1991); *Sheehy* v. *State*, 250 Mont. 437, 820 P. 2d 1257 (1991), cert. pending, No. 91–1473; *Duffy* v. *Wetzler*, 174 App. Div. 2d 253, 265, 579 N. Y. S. 2d 684, 691, appeal denied, 80 N. Y. 2d 890, 600 N. E. 2d 627 (1992), cert. pending, No. 92–521; *Swanson* v. *State*, 329 N. C. 576, 581–584, 407 S. E. 2d 791, 793–795 (1991), aff'd on reh'g, 330 N. C. 390, 410 S. E. 2d 490 (1991), cert. pending, No. 91–1436; *Ragsdale* v. *Department of Revenue*, 11 Ore. Tax 440 (1990), aff'd on other grounds, 312 Ore. 529, 823 P. 2d 971 (1992); *Bass* v. *State*, 307 S. C. 113, 121–122, 414 S. E. 2d 110, 114–115 (1992), cert. pending, No. 91–1697.

(holding that *Davis* applies retroactively but reasoning that state law precluded a refund), cert. pending, Nos. 92–1276 and 92–1453.[7]

After the Supreme Court of Virginia reaffirmed its original decision, we granted certiorari a second time. 504 U. S. 907 (1992). We now reverse.

II

"[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson* v. *Neil*, 409 U. S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed "[j]udicial decisions . . . for near a thousand years." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (1910) (Holmes, J., dissenting). In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), however, we developed a doctrine under which we could deny retroactive effect to a newly announced rule of criminal law. Under *Linkletter*, a decision to confine a new rule to prospective application rested on the purpose of the new rule, the reliance placed upon the previous view of the law, and "the effect on the administration of justice of a retrospective application" of the new rule. *Id.*, at 636 (limiting *Mapp* v. *Ohio*, 367 U. S. 643 (1961)).[8] In the civil context, we similarly permitted the denial of retroactive effect to "a new principle of law" if such a limitation would avoid " 'injustice or hardship' " without unduly undermining the "purpose

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[7] Several other state courts have ordered refunds as a matter of state law in claims based on *Davis*. See, *e. g.*, *Kuhn* v. *State*, 817 P. 2d 101, 109–110 (Colo. 1991); *Hackman* v. *Director of Revenue*, 771 S. W. 2d 77, 80–81 (Mo. 1989), cert. denied, 493 U. S. 1019 (1990).

[8] Accord, *e. g.*, *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966) (limiting *Griffin* v. *California*, 380 U. S. 609 (1965)); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966) (limiting *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966)); *Stovall* v. *Denno*, 388 U. S. 293 (1967) (limiting *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967)).

and effect" of the new rule. *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107 (quoting *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969)).[9]

We subsequently overruled *Linkletter* in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), and eliminated limits on retroactivity in the criminal context by holding that all "newly declared . . . rule[s]" must be applied retroactively to all "criminal cases pending on direct review." *Id.*, at 322. This holding rested on two "basic norms of constitutional adjudication." *Ibid.* First, we reasoned that "the nature of judicial review" strips us of the quintessentially "legislat[ive]" prerogative to make rules of law retroactive or prospective as we see fit. *Ibid.* Second, we concluded that "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Id.*, at 323.

Dicta in *Griffith*, however, stated that "civil retroactivity . . . . continue[d] to be governed by the standard announced in *Chevron Oil*." *Id.*, at 322, n. 8. We divided over the meaning of this dicta in *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990). The four Justices in the plurality used "the *Chevron Oil* test" to consider whether to confine "the application of [*American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987),] to taxation of highway use prior to June 23, 1987, the date we decided *Scheiner*." *Id.*,

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[9] We need not debate whether *Chevron Oil* represents a true "choice-of-law principle" or merely "a remedial principle for the exercise of equitable discretion by federal courts." *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 220 (1990) (STEVENS, J., dissenting). Compare *id.*, at 191–197 (plurality opinion) (treating *Chevron Oil* as a choice-of-law rule), with *id.*, at 218–224 (STEVENS, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one. *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 543 (1991) (opinion of SOUTER, J.).

at 179 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE and KENNEDY, JJ.). Four other Justices rejected the plurality's "anomalous approach" to retroactivity and declined to hold that "the law applicable to a particular case is that law which the parties believe in good faith to be applicable to the case." *Id.*, at 219 (STEVENS, J., dissenting, joined by Brennan, Marshall, and BLACKMUN, JJ.). Finally, despite concurring in the judgment, JUSTICE SCALIA "share[d]" the dissent's "perception that prospective decisionmaking is incompatible with the judicial role." *Id.*, at 201.

Griffith and *American Trucking* thus left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases. But we have since adopted a rule requiring the retroactive application of a civil decision such as *Davis*. Although *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991), did not produce a unified opinion for the Court, a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. In announcing the judgment of the Court, JUSTICE SOUTER laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl[ied] that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively." *Id.*, at 540 (opinion of SOUTER, J., joined by STEVENS, J.). JUSTICE SOUTER's view of retroactivity superseded "any claim based on a *Chevron Oil* analysis." *Ibid.* JUSTICE WHITE likewise concluded that a decision "extending the benefit of the judgment" to the winning party "is to be applied to other litigants whose cases were not final at the time of the [first] decision." *Id.*, at 544 (opinion concurring in judgment). Three other Justices agreed that "our judicial responsibility . . . requir[es] retroactive application of each . . . rule we announce." *Id.*, at 548 (BLACKMUN, J.,

joined by Marshall and SCALIA, JJ., concurring in judgment). See also *id.*, at 548–549 (SCALIA, J., joined by Marshall and BLACKMUN, JJ., concurring in judgment).

Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam:* When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*'s ban against "selective application of new rules." 479 U. S., at 323. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, *id.*, at 322, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking, supra,* at 214 (STEVENS, J., dissenting).

The Supreme Court of Virginia "appl[ied] the three-pronged *Chevron Oil* test in deciding the retroactivity issue" presented by this litigation. 242 Va., at 326, 410 S. E. 2d, at 631. When this Court does not "reserve the question whether its holding should be applied to the parties before it," however, an opinion announcing a rule of federal law "is properly understood to have followed the normal rule of retroactive application" and must be "read to hold . . . that its rule should apply retroactively to the litigants then before

the Court." *Beam*, 501 U. S., at 539 (opinion of SOUTER, J.). Accord, *id.*, at 544–545 (WHITE, J., concurring in judgment); *id.*, at 550 (O'CONNOR, J., dissenting). Furthermore, the legal imperative "to apply a rule of federal law retroactively after the case announcing the rule has already done so" must "prevai[l] over any claim based on a *Chevron Oil* analysis." *Id.*, at 540 (opinion of SOUTER, J.).

In an effort to distinguish *Davis*, the Supreme Court of Virginia surmised that this Court had "made no . . . ruling" about the application of the rule announced in *Davis* "retroactively to the litigants in that case." 242 Va., at 326, 410 S. E. 2d, at 631. "[B]ecause the retroactivity issue was not decided in *Davis*," the court believed that it was "not foreclosed by precedent from applying the three-pronged *Chevron Oil* test in deciding the retroactivity issue in the present case." *Ibid.*

We disagree. *Davis* did not hold that preferential state tax treatment of state and local employee pensions, though constitutionally invalid in the future, should be upheld as to all events predating the announcement of *Davis*. The governmental appellee in *Davis* "conceded that a refund [would have been] appropriate" if we were to conclude that "the Michigan Income Tax Act violate[d] principles of intergovernmental tax immunity by favoring retired state and local governmental employees over retired federal employees." 489 U. S., at 817. We stated that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Ibid.* Far from reserving the retroactivity question, our response to the appellee's concession constituted a retroactive application of the rule announced in *Davis* to the parties before the Court. Because a decision to accord solely prospective effect to *Davis* would have foreclosed any discussion of remedial issues, our "consideration of remedial issues" meant "necessarily" that we retroactively applied the rule we announced in *Davis* to the litigants before us. *Beam*, *supra*, at 539 (opinion of SOUTER, J.).

Therefore, under *Griffith*, *Beam*, and the retroactivity approach we adopt today, the Supreme Court of Virginia must apply *Davis* in petitioners' refund action.

III

Respondent Virginia Department of Taxation defends the judgment below as resting on an independent and adequate state ground that relieved the Supreme Court of Virginia of any obligation to apply *Davis* to events occurring before our announcement of that decision. Petitioners had contended that "even if the *Davis* decision applie[d] prospectively only," they were entitled to relief under Virginia's tax refund statute, Va. Code Ann. § 58.1–1826 (1991). *Harper* v. *Virginia Dept. of Taxation*, 241 Va., at 241, 401 S. E. 2d, at 873. The Virginia court rejected their argument. It first reasoned that because *Davis* did not apply retroactively, tax assessments predating *Davis* were "neither erroneous nor improper within the meaning" of Virginia's tax statute. *Ibid.* The court then offered "another reason" for rejecting petitioners' "state-law contention": "We previously have held that this Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only." *Ibid.* (citing *Perkins* v. *Albemarle County*, 214 Va. 240, 198 S. E. 2d 626, aff'd and modified on rehearing, 214 Va. 416, 200 S. E. 2d 566 (1973); *Capehart* v. *City of Chesapeake*, No. 5459 (Va. Cir. Ct., Oct. 16, 1974), appeal denied, 215 Va. xlvii, cert. denied, 423 U. S. 875 (1975)). The formulation of this state-law retroactivity doctrine—that "consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule," *Fountain* v. *Fountain*, 214 Va. 347, 348, 200 S. E. 2d 513, 514 (1973), cert. denied, 416 U. S. 939 (1974), quoted in 241 Va., at 241, 401 S. E. 2d, at 874—suggests that the Supreme Court of Virginia has simply incorporated into state law the three-pronged analysis of *Chevron Oil*, 404 U. S., at 106–107, and

the criminal retroactivity cases overruled by *Griffith*, see, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967).

We reject the department's defense of the decision below. The Supremacy Clause, U. S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, see *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364–366 (1932), cannot extend to their interpretations of federal law. See *National Mines Corp.* v. *Caryl*, 497 U. S. 922, 923 (1990) *(per curiam); Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 917 (1990) *(per curiam)*.

We also decline the Department of Taxation's invitation to affirm the judgment as resting on the independent and adequate ground that Virginia's law of remedies offered no "retrospective refund remedy for taxable years concluded before *Davis*" was announced. Brief for Respondent 33. The Virginia Supreme Court's conclusion that the challenged tax assessments were "neither erroneous nor improper within the meaning" of the refund statute rested solely on the court's determination that *Davis* did not apply retroactively. *Harper* v. *Virginia Dept. of Taxation*, *supra*, at 241, 401 S. E. 2d, at 873.

Because we have decided that *Davis* applies retroactively to the tax years at issue in petitioners' refund action, we reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund. Rather, the Constitution requires Virginia "to provide relief consistent with federal due process principles." *American Trucking*, 496 U. S., at 181 (plurality opinion). Under the Due Process Clause, U. S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson Corp.* v. *Division of*

Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U. S. 18, 39–40 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." *Id.*, at 38, n. 21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.*, at 31 (footnotes omitted).[10] In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." *Id.*, at 40. Cf. *Davis*, 489 U. S., at 818 (suggesting that a State's failure to respect intergovernmental tax immunity could be cured "either by extending [a discriminatory] tax exemption to retired federal employees . . . or by eliminating the exemption for retired state and local government employees").

The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law "provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax

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[10] A State incurs this obligation when it "places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality." *McKesson*, 496 U. S., at 31. A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained and resolved" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *Id.*, at 38 (emphasis in original). Such limitations impose constitutionally significant "'duress'" because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property." *Id.*, at 38, n. 21. The State accordingly may not confine a taxpayer under duress to prospective relief.

prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." *McKesson*, 496 U. S., at 36–37. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia "is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *Id.*, at 51–52. State law may provide relief beyond the demands of federal due process, *id.*, at 52, n. 36, but under no circumstances may it confine petitioners to a lesser remedy, see *id.*, at 44–51.

IV

We reverse the judgment of the Supreme Court of Virginia, and we remand the case for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE SCALIA, concurring.

I am surprised to see an appeal to *stare decisis* in today's dissent. In *Teague* v. *Lane*, 489 U. S. 288 (1989), JUSTICE O'CONNOR wrote for a plurality that openly rejected settled precedent controlling the scope of retroactivity on collateral review. "This retroactivity determination," the opinion said, "would normally entail application of the *Linkletter* [v. *Walker*, 381 U. S. 618 (1965),] standard, but we believe that our approach to retroactivity for cases on collateral review requires modification." *Id.*, at 301. The dissent in *Teague* was a sort of anticipatory echo of today's dissent, criticizing the plurality for displaying "infidelity to the doctrine of *stare decisis*," *id.*, at 331 (Brennan, J., dissenting), for "upset[ting] . . . our time-honored precedents," *id.*, at 333, for "repudiating our familiar approach without regard for the doctrine of *stare decisis*," *id.*, at 345, and for failing "so much as [to] mention *stare decisis*," *id.*, at 333.

I joined the plurality opinion in *Teague*. Not only did I believe the rule it announced was correct, see *Withrow* v. *Williams*, 507 U. S. 680, 717 (1993) (SCALIA, J., concurring in part and dissenting in part), but I also believed that abandonment of our prior collateral-review retroactivity rule was fully in accord with the doctrine of *stare decisis*, which as applied by our Court has never been inflexible. The *Teague* plurality opinion set forth good reasons for abandoning *Linkletter*—reasons justifying a similar abandonment of *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). It noted, for example, that *Linkletter* "ha[d] not led to consistent results," *Teague*, *supra*, at 302; but neither has *Chevron Oil*. Proof that what it means is in the eye of the beholder is provided quite nicely by the separate opinions filed today: Of the four Justices who would still apply *Chevron Oil*, two find *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), retroactive, see *post*, at 111 (KENNEDY, J., concurring in part and concurring in judgment), two find it not retroactive, see *post*, at 122 (O'CONNOR, J., dissenting). Second, the *Teague* plurality opinion noted that *Linkletter* had been criticized by commentators, *Teague*, *supra*, at 303; but the commentary cited in the opinion criticized not just *Linkletter*, but the Court's retroactivity jurisprudence in general, of which it considered *Chevron Oil* an integral part, see Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558, 1581–1582, 1606 (1975). Other commentary, of course, has also regarded the issue of retroactivity as a general problem of jurisprudence. See, *e. g.*, Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991); Schaefer, Prospective Rulings: Two Perspectives, 1982 S. Ct. Rev. 1; Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967); Mishkin, Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 58–72 (1965).

Finally, the plurality opinion in *Teague* justified the departure from *Linkletter* by implicitly relying on the well-settled proposition that *stare decisis* has less force where intervening decisions "have removed or weakened the conceptual underpinnings from the prior decision." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989). JUSTICE O'CONNOR endorsed the reasoning expressed by Justice Harlan in his separate opinions in *Mackey* v. *United States*, 401 U. S. 667 (1971), and *Desist* v. *United States*, 394 U. S. 244 (1969), and noted that the Court had already adopted the first part of Justice Harlan's retroactivity views in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). See *Teague*, *supra*, at 303–305. Again, this argument equally—indeed, even more forcefully—supports reconsideration of *Chevron Oil*. *Griffith* returned this Court, in criminal cases, to the traditional view (which I shall discuss at greater length below) that prospective decisionmaking "violates basic norms of constitutional adjudication." *Griffith*, *supra*, at 322. One of the conceptual underpinnings of *Chevron Oil* was that retroactivity presents a *similar* problem in both civil and criminal contexts. See *Chevron Oil*, *supra*, at 106; see also Beytagh, *supra*, at 1606. Thus, after *Griffith*, *Chevron Oil* can be adhered to *only by rejecting the reasoning of Chevron Oil*—that is, only by asserting that the issue of retroactivity is *different* in the civil and criminal settings. That is a particularly difficult proof to make, inasmuch as *Griffith* rested on "basic norms of constitutional adjudication" and "the nature of judicial review." 479 U. S., at 322; see also *Teague*, *supra*, at 317 (WHITE, J., concurring in part and concurring in judgment) (*Griffith* "appear[s] to have constitutional underpinnings").[1]

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[1] The dissent attempts to distinguish between retroactivity in civil and criminal settings on three grounds, none of which has ever been adopted by this Court. The dissent's first argument begins with the observation that "nonretroactivity in criminal cases historically has favored the government's reliance interests over the rights of criminal defend-

What most provokes comment in the dissent, however, is not its insistence that today a rigid doctrine of *stare decisis* forbids tinkering with retroactivity, which four Terms ago did not; but rather the irony of its invoking *stare decisis* in defense of prospective decisionmaking *at all*. Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. B. Levy, Realist Jurisprudence and Prospective Overruling,

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ants." *Post*, at 121. But while it is true that prospectivity was usually employed in the past (during the brief period when it was used in criminal cases) to favor the government, there is no basis for the implicit suggestion that it would usually favor the government in the future. That phenomenon was a consequence, not of the nature of the doctrine, cf. *James* v. *United States*, 366 U. S. 213 (1961), but of the historical "accident" that during the period prospectivity was in fashion legal rules favoring the government were more frequently overturned. But more fundamentally, to base a rule of full retroactivity in the criminal-law area upon what the dissent calls "the generalized policy of favoring individual rights over governmental prerogative," *post*, at 121, makes no more sense than to adopt, because of the same "generalized policy," a similarly gross rule that no decision favoring criminal defendants can ever be overruled. The law is more discerning than that. The dissent's next argument is based on the dubious empirical assumption that civil litigants, but not criminal defendants, will often receive some benefit from a prospective decision. That assumption does not hold even in this case: Prospective invalidation of Virginia's taxing scheme would afford petitioners the enormous future "benefit," *ibid.*, of knowing that others in the State are being taxed more. But empirical problems aside, the dissent does not explain why, if a receipt-of-some-benefit principle is important, we should use such an inaccurate proxy as the civil/criminal distinction, or how this newly discovered principle overcomes the "basic norms of constitutional adjudication" on which *Griffith* v. *Kentucky*, 479 U. S. 314, 322 (1987), rested. Finally, the dissent's "equal treatment" argument ably distinguishes between cases in which a prospectivity claim is properly raised, and those in which it is not. See *post*, at 122. But that does nothing to distinguish between civil and criminal cases; obviously, a party may procedurally default on a claim in either context.

109 U. Pa. L. Rev. 1 (1960). Thus, the dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis.*

Contrary to the dissent's assertion that *Chevron Oil* articulated "our traditional retroactivity analysis," *post,* at 113, the jurisprudence it reflects "came into being," as Justice Harlan observed, less than 30 years ago with *Linkletter* v. *Walker,* 381 U. S. 618 (1965). *Mackey, supra,* at 676. It is so unancient that one of the current Members of this Court was sitting when it was invented. The true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice. See *ante,* at 94; *James B. Beam Distilling Co.* v. *Georgia,* 501 U. S. 529, 534 (1991) (opinion of SOUTER, J.); *American Trucking Assns., Inc.* v. *Smith,* 496 U. S. 167, 201 (1990) (SCALIA, J., concurring in judgment); *Desist, supra,* at 258–259 (Harlan, J., dissenting); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 365 (1932). *Linkletter* itself recognized that "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." 381 U. S., at 622–623. And before *Linkletter,* the academic proponents of prospective judicial decisionmaking acknowledged that their proposal contradicted traditional practice. See, *e. g.,* Levy, *supra,* at 2, and n. 2; Carpenter, Court Decisions and the Common Law, 17 Colum. L. Rev. 593, 594 (1917). Indeed, the roots of the contrary tradition are so deep that Justice Holmes was prepared to hazard the guess that "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 372 (1910) (dissenting opinion).

JUSTICE O'CONNOR asserts that "'[w]hen the Court changes its mind, the law changes with it.'" *Post,* at 115 (quoting *Beam, supra,* at 550 (O'CONNOR, J., dissenting)). That concept is quite foreign to the American legal and con-

stitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power. The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law *is*," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (emphasis added)—not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. Blackstone, Commentaries 69 (1765). Even when a "former determination is most evidently contrary to reason . . . [or] contrary to the divine law," a judge overruling that decision would "not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.*, at 69–70. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.*, at 70 (emphases in original). Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." T. Cooley, Constitutional Limitations *91. The critics of the traditional rule of full retroactivity were well aware that it was grounded in what one of them contemptuously called "another fiction known as the Separation of powers." Kocourek, Retrospective Decisions and Stare Decisis and a Proposal, 17 A. B. A. J. 180, 181 (1931).

Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disre-

gard for *stare decisis*. In the eyes of its enemies, the doctrine "smack[ed] of the legislative process," Mishkin, 79 Harv. L. Rev., at 65, "encroach[ed] on the prerogatives of the legislative department of government," Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 428 (1924), removed "one of the great inherent restraints upon this Court's depart[ing] from the field of interpretation to enter that of lawmaking," *James* v. *United States*, 366 U. S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part), caused the Court's behavior to become "assimilated to that of a legislature," Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 34 (1969), and tended "to cut [the courts] loose from the force of precedent, allowing [them] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*," *Mackey*, 401 U. S., at 680 (Harlan, J., concurring in judgment). All this was not denied by the doctrine's friends, who also viewed it as a device to "augmen[t] the power of the courts to contribute to the growth of the law in keeping with the demands of society," Mallamud, Prospective Limitation and the Rights of the Accused, 56 Iowa L. Rev. 321, 359 (1970), as "a deliberate and conscious technique of judicial lawmaking," Levy, 109 U. Pa. L. Rev., at 6, as a means of "facilitating more effective and defensible judicial lawmaking," *id.*, at 28.

Justice Harlan described this Court's embrace of the prospectivity principle as "the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation," *Mackey*, *supra*, at 676. The Court itself, however, glowingly described the doctrine as the cause rather than the effect of innovation, extolling it as a "technique" providing the "impetus . . . for the implementation of long overdue reforms." *Jenkins* v. *Delaware*, 395 U. S. 213, 218 (1969). Whether cause or effect, there is no doubt that the era which gave birth to the prospectivity principle was marked by a newfound disregard for *stare decisis*. As one

commentator calculated, "[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions." Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467. It was an era when this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious "heave-ho." See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (overruling *Wolf* v. *Colorado*, 338 U. S. 25 (1949)); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (overruling *Betts* v. *Brady*, 316 U. S. 455 (1942)); *Miranda* v. *Arizona*, 384 U. S. 436, 479, n. 48 (1966) (overruling *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958)); *Katz* v. *United States*, 389 U. S. 347 (1967) (overruling *Olmstead* v. *United States*, 277 U. S. 438 (1928), and *Goldman* v. *United States*, 316 U. S. 129 (1942)). To argue now that one of the jurisprudential tools of judicial activism from that period should be extended on grounds of *stare decisis* can only be described as paradoxical.[2]

In sum, I join the opinion of the Court because the doctrine of prospective decisionmaking is not in fact protected

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[2] Contrary to the suggestion in the dissent, I am not arguing that we should "cast overboard our *entire* retroactivity doctrine with . . . [an] unceremonious heave-ho." *Post*, at 116 (emphasis added; internal quotation marks omitted). There is no need. We cast over the first half six Terms ago in *Griffith*, and deep-sixed most of the rest two Terms ago in *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991)—in neither case unceremoniously (in marked contrast to some of the overrulings cited in text). What little, if any, remains is teetering at the end of the plank and needs no more than a gentle nudge. But if the entire doctrine had been given a quick and unceremonious end, there could be no complaint on the grounds of *stare decisis;* as it was born, so should it die. I do not know the basis for the dissent's contention that I find the jurisprudence of the era that produced the doctrine of prospectivity "distasteful." *Post*, at 116. Much of it is quite appetizing. It is only the cavalier treatment of *stare decisis* and the invention of prospectivity that I have criticized here.

by our flexible rule of *stare decisis;* and because no friend of *stare decisis* would want it to be.

JUSTICE KENNEDY, with whom JUSTICE WHITE joins, concurring in part and concurring in the judgment.

I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision. "[P]rospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *American Trucking Assns., Inc.* v. *Smith,* 496 U. S. 167, 197 (1990) (plurality opinion). When a court promulgates a new rule of law, prospective application functions "to avoid injustice or hardship to civil litigants who have justifiably relied on prior law." *Id.,* at 199 (internal quotation marks omitted). See *Phoenix* v. *Kolodziejski,* 399 U. S. 204, 213–215 (1970); *Cipriano* v. *City of Houma,* 395 U. S. 701, 706 (1969) *(per curiam); England* v. *Louisiana Bd. of Medical Examiners,* 375 U. S. 411, 422 (1964). And in my view retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106–107 (1971). Thus, for the reasons explained by JUSTICE O'CONNOR, *post,* at 113–117, I cannot agree with the Court's broad dicta, *ante,* at 95–97, that appears to embrace in the civil context the retroactivity principles adopted for criminal cases in *Griffith* v. *Kentucky,* 479 U. S. 314 (1987). As JUSTICE O'CONNOR has demonstrated elsewhere, the differences between the civil and criminal contexts counsel strongly against adoption of *Griffith* for civil cases. See *American Trucking Assns., Inc.* v. *Smith, supra,* at 197–199. I also cannot accept the Court's conclusion, *ante,* at 96–99, which is based on JUSTICE SOUTER's opinion in *James B. Beam Distilling Co.* v. *Georgia,* 501 U. S. 529, 540–543 (1991), that a decision of this Court must be applied in a retroactive manner simply because the rule of law there announced happened to be applied to the parties then before the Court.

See *post*, at 117–122 (O'CONNOR, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia*, *supra*, at 550–552 (O'CONNOR, J., dissenting). For these reasons, I do not join Part II of the Court's opinion.

I nonetheless agree with the Court that *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), must be given retroactive effect. The first condition for prospective application of any decision is that it must announce a new rule of law. *Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 918 (1990) *(per curiam)*; *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 179; *United States* v. *Johnson*, 457 U. S. 537, 550, n. 12 (1982); *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107. The decision must "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Id.*, at 106. Because *Davis* did neither, it did not announce new law and therefore must be applied in a retroactive manner.

Respondent argues that two new principles of law were established in *Davis*. First, it points to the holding that 4 U. S. C. § 111, in which the United States consents to state taxation of the compensation of "an officer or employee of the United States," applies to federal retirees as well as current federal employees. Brief for Respondent 16–18. See *Davis*, 489 U. S., at 808–810. In *Davis*, however, we indicated that this holding was "dictate[d]" by "the plain language of the statute," *id.*, at 808, and we added for good measure our view that the language of the statute was "unambiguous," "unmistakable," and "leaves no room for doubt," *id.*, at 809, n. 3, 810. Given these characterizations, it is quite implausible to contend that in this regard *Davis* decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, *supra*, at 106.

The second new rule respondent contends the Court announced in *Davis* was that the state statute at issue discriminated against federal retirees even though the statute treated them like all other state taxpayers except state em-

ployees. Brief for Respondent 18–26. See *Davis, supra,* at 814, 815, n. 4. The *Davis* Court, however, anchored its decision in precedent. We observed that in *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376 (1960), "we faced th[e] precise situation" confronting us in *Davis,* and so *Phillips Chemical* controlled our holding. 489 U. S., at 815, n. 4. To be sure, JUSTICE STEVENS in dissent disagreed with these contentions and attempted to distinguish *Phillips Chemical.* 489 U. S., at 824–826. The Court, however, was not persuaded at the time, and I remain convinced that the Court had the better reading of *Phillips Chemical.* A contrary holding in *Davis,* in my view, would have created a clear inconsistency in our jurisprudence. Under *Chevron Oil,* application of precedent which directly controls is not the stuff of which new law is made.

Far from being "revolutionary," *Ashland Oil Co.* v. *Caryl, supra,* at 920, or "an avulsive change which caused the current of the law thereafter to flow between new banks," *Hanover Shoe, Inc.* v. *United Shoe Machinery Co.*, 392 U. S. 481, 499 (1968), *Davis* was a mere application of plain statutory language and existing precedent. In these circumstances, this Court is not free to mitigate any financial hardship that might befall Virginia's taxpayers as a result of their state government's failure to reach a correct understanding of the unambiguous dictates of federal law.

Because I do not believe that *Davis* v. *Michigan Dept. of Treasury, supra,* announced a new principle of law, I have no occasion to consider JUSTICE O'CONNOR's argument, *post,* at 131–136, that equitable considerations may inform the formulation of remedies when a new rule is announced. In any event, I do not read Part III of the Court's opinion as saying anything inconsistent with what JUSTICE O'CONNOR proposes.

On this understanding, I join Parts I and III of the Court's opinion and concur in its judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Today the Court applies a new rule of retroactivity to impose crushing and unnecessary liability on the States, precisely at a time when they can least afford it. Were the Court's decision the product of statutory or constitutional command, I would have no choice but to join it. But nothing in the Constitution or statute requires us to adopt the retroactivity rule the majority now applies. In fact, longstanding precedent requires the opposite result. Because I see no reason to abandon our traditional retroactivity analysis as articulated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), and because I believe the Supreme Court of Virginia correctly applied *Chevron Oil* in this case, I would affirm the judgment below.

I

This Court's retroactivity jurisprudence has become somewhat chaotic in recent years. Three Terms ago, the case of *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990), produced three opinions, none of which garnered a majority. One Term later, *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991), yielded five opinions; there, no single writing carried more than three votes. As a result, the Court today finds itself confronted with such disarray that, rather than relying on precedent, it must resort to vote counting: Examining the various opinions in *Jim Beam*, it discerns six votes for a single proposition that, in its view, controls this case. *Ante*, at 96–97.

If we had given appropriate weight to the principle of *stare decisis* in the first place, our retroactivity jurisprudence never would have become so hopelessly muddled. After all, it was not that long ago that the law of retroactivity for civil cases was considered well settled. In *Chevron Oil Co.*, we explained that whether a decision will be nonretroactive depends on whether it announces a new rule, whether prospectivity would undermine the purposes of the

rule, and whether retroactive application would produce injustice. 404 U. S., at 106–107. Even when this Court adjusted the retroactivity rule for criminal cases on direct review some six years ago, we reaffirmed the vitality of *Chevron Oil*, noting that retroactivity in civil cases "continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson.*" *Griffith* v. *Kentucky*, 479 U. S. 314, 322, n. 8 (1987). In *American Trucking Assns., supra*, however, a number of Justices expressed a contrary view, and the jurisprudential equivalent of entropy immediately took over. Whatever the merits of any retroactivity test, it cannot be denied that resolution of the case before us would be simplified greatly had we not disregarded so needlessly our obligation to follow precedent in the first place.

I fear that the Court today, rather than rectifying that confusion, reinforces it still more. In the usual case, of course, retroactivity is not an issue; the courts simply apply their best understanding of current law in resolving each case that comes before them. *James B. Beam*, 501 U. S., at 534, 535–536 (SOUTER, J.). But where the law changes in some respect, the courts sometimes may elect not to apply the new law; instead, they apply the law that governed when the events giving rise to the suit took place, especially where the change in law is abrupt and the parties may have relied on the prior law. See *id.*, at 534. This can be done in one of two ways. First, a court may choose to make the decision purely prospective, refusing to apply it not only to the parties before the court but also to *any* case where the relevant facts predate the decision. *Id.*, at 536. Second, a court may apply the rule to some but not all cases where the operative events occurred before the court's decision, depending on the equities. See *id.*, at 537. The first option is called "pure prospectivity" and the second "selective prospectivity."

As the majority notes, *ante*, at 96–97, six Justices in *James B. Beam, supra*, expressed their disagreement with selective prospectivity. Thus, even though there was no majority

opinion in that case, one can derive from that case the proposition the Court announces today: Once "this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review." *Ante*, at 97. But no decision of this Court forecloses the possibility of pure prospectivity—refusal to apply a new rule in the very case in which it is announced and every case thereafter. As JUSTICE WHITE explained in his concurrence in *James B. Beam*, "[t]he propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions." 501 U. S., at 546 (opinion concurring in judgment).

Rather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well. See *ante*, at 97 (referring to our lack of "'constitutional authority . . . to disregard current law'"); *ibid.* (relying on "'basic norms of constitutional adjudication'" (quoting *Griffith*, *supra*, at 322)); see also *ante*, at 94 (touting the "fundamental rule of 'retrospective operation'" of judicial decisions). The intimation is incorrect. As I have explained before and will touch upon only briefly here:

> "[W]hen the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make [a] determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry." *James B. Beam*, *supra*, at 550 (O'CONNOR, J., dissenting) (internal quotation marks omitted).

Nor can the Court's suggestion be squared with our cases, which repeatedly have announced rules of purely prospective effect. See, *e. g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982); *Chevron Oil*, 404

U. S., at 106–107; *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 214 (1970); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); see also *American Trucking Assns.*, 496 U. S., at 188–200 (plurality opinion) (canvassing the Court's retroactivity jurisprudence); *ante*, at 110 (KENNEDY, J., concurring in part and concurring in judgment) (citing cases).

In any event, the question of pure prospectivity is not implicated here. The majority first holds that once a rule *has been* applied retroactively, the rule must be applied retroactively to all cases thereafter. *Ante*, at 97. Then it holds that *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), in fact retroactively applied the rule it announced. *Ante*, at 98–99. Under the majority's approach, that should end the matter: Because the Court applied the rule retroactively in *Davis*, it must do so here as well. Accordingly, there is no reason for the Court's careless dictum regarding pure prospectivity, much less dictum that is contrary to clear precedent.

Plainly enough, JUSTICE SCALIA would cast overboard our entire retroactivity doctrine with precisely the "unceremonious 'heave-ho'" he decries in his concurrence. See *ante*, at 109. Behind the undisguised hostility to an era whose jurisprudence he finds distasteful, JUSTICE SCALIA raises but two substantive arguments, both of which were raised in *James B. Beam*, 501 U. S., at 549 (SCALIA, J., concurring in judgment), and neither of which has been adopted by a majority of this Court. JUSTICE WHITE appropriately responded to those arguments then, see *id.*, at 546 (opinion concurring in judgment), and there is no reason to repeat the responses now. As Justice Frankfurter explained more than 35 years ago:

> "We should not indulge in the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to

a new pronouncement of law." *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956) (opinion concurring in judgment).

II

I dissented in *James B. Beam* because I believed that the absolute prohibition on selective prospectivity was not only contrary to precedent, but also so rigid that it produced unconscionable results. I would have adhered to the traditional equitable balancing test of *Chevron Oil* as the appropriate method of deciding the retroactivity question in individual cases. But even if one believes the prohibition on selective prospectivity desirable, it seems to me that the Court today takes that judgment to an illogical—and inequitable—extreme. It is one thing to say that, where we have considered prospectivity in a prior case and rejected it, we must reject it in every case thereafter. But it is quite another to hold that, because we did *not* consider the possibility of prospectivity in a prior case and instead applied a rule retroactively through inadvertence, we are foreclosed from considering the issue forever thereafter. Such a rule is both contrary to established precedent and at odds with any notion of fairness or sound decisional practice. Yet that is precisely the rule the Court appears to adopt today. *Ante*, at 96–97.

A

Under the Court's new approach, we have neither authority nor discretion to consider the merits of applying *Davis* v. *Michigan Dept. of Treasury*, *supra*, retroactively. Instead, we must inquire whether any of our previous decisions happened to have applied the *Davis* rule retroactively to the parties before the Court. Deciding whether we in fact have applied *Davis* retroactively turns out to be a rather difficult matter. Parsing the language of the *Davis* opinion, the Court encounters a single sentence it declares determinative: "The State having conceded that a refund is appropriate in

these circumstances, see Brief for Appellee 63, to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Id.*, at 817 (quoted in part, *ante*, at 98). According to the majority, that sentence constitutes "'consideration of remedial issues'" and therefore "'necessarily'" indicates that we applied the rule in *Davis* retroactively to the parties before us. *Ante*, at 98 (quoting *James B. Beam*, *supra*, at 539 (opinion of SOUTER, J.)). Ironically, respondent and its *amici* draw precisely the opposite conclusion from the same sentence. According to them, the fact that Michigan conceded that it would offer relief meant that we had no reason to decide the question of retroactivity in *Davis*. Michigan was willing to provide relief whether or not relief was required. The Court simply accepted that offer and preserved the retroactivity question for another day.

One might very well debate the meaning of the single sentence on which everyone relies. But the debate is as meaningless as it is indeterminate. In *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), we reaffirmed our longstanding rule that, if a decision does not "squarely addres[s] [an] issue," this Court remains "free to address [it] on the merits" at a later date. *Id.*, at 631. Accord, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952) (issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on th[e] point"); *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents"). The rule can be traced back to some of the earliest of this Court's decisions. See statement of Marshall, C. J., as reported in the arguments of counsel in *United States* v. *More*, 3 Cranch 159, 172 (1805) ("No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case"). Regardless of

how one reads the solitary sentence upon which the Court relies, surely it does not "squarely address" the question of retroactivity; it does not even mention retroactivity. At best, by addressing the question of remedies, the sentence implicitly "assumes" the rule in *Davis* to be retroactive. Our decision in *Brecht*, however, makes it quite clear that unexamined assumptions do not bind this Court. *Brecht*, *supra*, at 631 (That the Court "assumed the applicability of" a rule does not bind the Court to the assumption).

In fact, there is far less reason to consider ourselves bound by precedent today than there was in *Brecht*. In *Brecht*, the issue was not whether a legal question was resolved by a single case; it was whether our consistent practice of applying a particular rule, *Chapman* v. *California*, 386 U. S. 18, 24 (1967), to cases on collateral review precluded us from limiting the rule's application to cases on direct review. Because none of our prior cases directly had addressed the applicability of *Chapman* to cases on collateral review—each had only assumed it applied—the Court held that those cases did not bind us to any particular result. See *Brecht*, *supra*, at 630–631. I see no reason why a single retroactive application of the *Davis* rule, inferred from the sparse and ambiguous language of *Davis* itself, should carry more weight here than our consistent practice did in *Brecht*.

The Court offers no justification for disregarding the settled rule we so recently applied in *Brecht*. Nor do I believe it could, for the rule is not a procedural nicety. On the contrary, it is critical to the soundness of our decisional processes. It should go without saying that any decision of this Court has wide-ranging applications; nearly every opinion we issue has effects far beyond the particular case in which it issues. The rule we applied in *Brecht*, which limits the *stare decisis* effect of our decisions to questions actually considered and passed on, ensures that this Court does not decide important questions by accident or inadvertence. By adopting a contrary rule in the area of retroactivity, the

Court now permanently binds itself to its every unexamined assumption or inattention. Any rule that creates a grave risk that we might resolve important issues of national concern *sub silentio*, without thought or consideration, cannot be a wise one.

This case demonstrates the danger of such a rule. The question of retroactivity was never briefed in *Davis*. It had not been passed upon by the court below. And it was not within the question presented. Indeed, at oral argument we signaled that we would *not* pass upon the retroactivity of the rule *Davis* would announce. After conceding that the Michigan Department of Taxation would give Davis himself a refund if he prevailed, counsel for the department argued that it would be unfair to require Michigan to provide refunds to the 24,000 taxpayers who were not before the Court. The following colloquy ensued:

> "[COURT]: So why do we have to answer that at all?
>
> "[MICHIGAN]: —if, if this Court issues an opinion stating that the current Michigan classification is unconstitutional or in violation of the statute, there are these 24,000 taxpayers out there.
>
> . . . . .
>
> "[COURT]: But that's not—it's not here, is it? Is that question here?
>
> "[MICHIGAN]: It is not specifically raised, no." Tr. of Oral Arg., O. T. 1988, No. 87–1020, pp. 37–38.

Now, however, the Court holds that the question was implicitly before us and that, even though the *Davis* opinion does not even discuss the question of retroactivity, it resolved the issue conclusively and irretrievably.

If *Davis* somehow did decide that its rule was to be retroactive, it was by chance and not by design. The absence of briefing, argument, or even mention of the question belies any suggestion that the issue was given thoughtful consideration. Even the author of the *Davis* opinion refuses to ac-

cept the notion that *Davis* resolved the question of retroactivity. Instead, JUSTICE KENNEDY applies the analysis of *Chevron Oil* to resolve the retroactivity question today. See *ante*, at 110–112 (opinion concurring in part and concurring in judgment).

The Court's decision today cannot be justified by comparison to our decision in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), which abandoned selective prospectivity in the criminal context. *Ante*, at 97. As I explained in *American Trucking Assns.*, 496 U. S., at 197–200, there are significant differences between criminal and civil cases that weigh against such an extension. First, nonretroactivity in criminal cases historically has favored the government's reliance interests over the rights of criminal defendants. As a result, the generalized policy of favoring individual rights over governmental prerogative can justify the elimination of prospectivity in the criminal arena. The same rationale cannot apply in civil cases, as nonretroactivity in the civil context does not necessarily favor plaintiffs or defendants; "nor is there any policy reason for protecting one class of litigants over another." *Id.*, at 198. More important, even a party to civil litigation who is "deprived of the full retroactive benefit of a new decision may receive some relief." *Id.*, at 198–199. Here, for example, petitioners received the benefit of prospective invalidation of Virginia's taxing scheme. From this moment forward, they will be treated on an equal basis with all other retirees, the very treatment our intergovernmental immunity cases require. The criminal defendant, in contrast, is usually interested only in one remedy—reversal of his conviction. *That* remedy can be obtained only if the rule is applied retroactively. See *id.*, at 199.

Nor can the Court's rejection of selective retroactivity in the civil context be defended on equal treatment grounds. See *Griffith*, *supra*, at 323 (selective retroactivity accords a benefit to the defendant in whose case the decision is announced but not to any defendant thereafter). It may well

be that there is little difference between the criminal defendant in whose case a decision is announced and the defendant who seeks certiorari on the same question two days later. But in this case there is a tremendous difference between the defendant in whose case the *Davis* rule was announced and the defendant who appears before us today: The latter litigated and preserved the retroactivity question while the former did not. The Michigan Department of Taxation did not even brief the question of retroactivity in *Davis*. Respondent, in contrast, actually prevailed on the question in the court below.

If the Court is concerned with equal treatment, that difference should be dispositive. Having failed to demand the unusual, prospectivity, respondent in *Davis* got the usual—namely, retroactivity. Respondent in this case *has* asked for the unusual. In fact, respondent here defends a judgment below that awarded it just that. I do not see how the principles of equality can support forcing the Commonwealth of Virginia to bear the harsh consequences of retroactivity simply because, years ago, the Michigan Department of Taxation failed to press the issue—and we neglected to consider it. Instead, the principles of fairness favor addressing the contentions the Virginia Department of Taxation presses before us by applying *Chevron Oil* today. It is therefore to *Chevron Oil* that I now turn.

B

Under *Chevron Oil*, whether a decision of this Court will be applied nonretroactively depends on three factors. First, as a threshold matter, "the decision to be applied nonretroactively must establish a new principle of law." 404 U. S., at 106. Second, nonretroactivity must not retard the new rule's operation in light of its history, purpose, and effect. *Id.*, at 107. Third, nonretroactivity must be necessary to avoid the substantial injustice and hardship that a holding of retroactivity might impose. *Ibid.* In my view, all three factors favor holding our decision in *Davis* nonretroactive.

1

As JUSTICE KENNEDY points out in his concurrence, *ante*, at 111, a decision cannot be made nonretroactive unless it announces "a new principle of law." *Chevron Oil*, 404 U. S., at 106. For purposes of civil retroactivity, *Chevron Oil* identifies two types of decisions that can be new. First, a decision is new if it overturns "clear past precedent on which litigants may have relied." *Ibid.*; *ante*, at 111 (KENNEDY, J., concurring in part and concurring in judgment). I agree with JUSTICE KENNEDY that *Davis* did not represent such a "'revolutionary'" or "'avulsive change'" in the law. *Ante*, at 112 (quoting *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 499 (1968)).

Nonetheless, *Chevron* also explains that a decision may be "new" if it resolves "an issue of first impression whose resolution was not *clearly* foreshadowed." *Chevron Oil*, *supra*, at 106 (emphasis added). Thus, even a decision that is "controlled by the . . . principles" articulated in precedent may announce a new rule, so long as the rule was "sufficiently debatable" in advance. *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1109 (1983) (O'CONNOR, J., concurring). Reading the *Davis* opinion alone, one might get the impression that it did not announce a new rule even of that variety. The opinion's emphatic language suggests that the outcome was not even debatable. See *ante*, at 111 (KENNEDY, J., concurring in part and concurring in judgment). In my view, however, assertive language is not itself determinative. As THE CHIEF JUSTICE explained for the Court in a different context:

> "[T]he fact that a court says that its decision . . . is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' . . . . Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even

> when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

In *Butler*, we determined that the rule announced in *Arizona* v. *Roberson*, 486 U. S. 675 (1988), was "new" for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989), despite *Roberson*'s repeated assertions that its rule was "directly controlled" by precedent. Indeed, we did not even feel bound by the opinion's statement that it was not announcing a new rule at all but rather declining to create an exception to an existing rule. While *Teague* and its progeny may not provide the appropriate standard of novelty for *Chevron Oil* purposes, their teaching—that whether an opinion is new depends not on its language or tone but on the legal landscape from which it arose—obtains nonetheless.

In any event, JUSTICE STEVENS certainly thought that *Davis* announced a new rule. In fact, he thought that the rule was not only unprecedented, but wrong: "The Court's holding is not supported by the rationale for the intergovernmental immunity doctrine and is not compelled by our previous decisions. I cannot join the unjustified, court-imposed restriction on a State's power to administer its own affairs." 489 U. S., at 818–819 (dissenting opinion). And just last Term two Members of this Court expressed their disagreement with the decision in *Davis*, labeling its application of the doctrine of intergovernmental immunity "perverse." *Barker* v. *Kansas*, 503 U. S. 594, 606 (1992) (STEVENS, J., joined by THOMAS, J., concurring). Although I would not call our decision in *Davis* perverse, I agree that its rule was sufficiently debatable in advance as to fall short of being "clearly foreshadowed." The great weight of authority is in accord.*

**Swanson* v. *Powers*, 937 F. 2d 965, 968, 970, 971 (CA4 1991) ("The most pertinent judicial decisions" were contrary to a holding of immunity and "the rationale behind the precedent might have suggested a different re-

In fact, before *Davis* was announced, conventional wisdom seemed to be directly to the contrary. One would think that, if *Davis* was "clearly foreshadowed," some taxpayer might have made the intergovernmental immunity argument before. No one had. Twenty-three States had taxation schemes just like the one at issue in *Davis;* and some of those schemes were established as much as half a century before *Davis* was decided. See *Harper* v. *Virginia Dept. of Taxation*, 241 Va. 232, 237, 401 S. E. 2d 868, 871 (1991). Yet not a single taxpayer ever challenged one of those schemes on intergovernmental immunity grounds until Davis challenged Michigan's in 1984. If Justice Holmes is correct that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious" are "law," O. Holmes, The Path of the Law, in Collected Legal Papers 167, 173 (1920), then surely *Davis* announced *new* law; the universal "prophecy" before *Davis* seemed to be that such taxation schemes were valid.

An examination of the decision in *Davis* and its predecessors reveals that *Davis* was anything but clearly foreshadowed. Of course, it was well established long before *Davis* that the nondiscrimination principle of 4 U. S. C. § 111 and the doctrine of intergovernmental immunity prohibit a State from imposing a discriminatory tax on the United States or

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sult in [*Davis* itself]"; "how the intergovernmental tax immunity doctrine and 4 U. S. C. § 111 applied to [plans like the one at issue in *Davis*] was anything but clearly established prior to *Davis*"); *Harper* v. *Virginia Dept. of Taxation*, 241 Va. 232, 238, 401 S. E. 2d 868, 872 (1991) ("[T]he *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed"); *Swanson* v. *State*, 329 N. C. 576, 583, 407 S. E. 2d 791, 794 (1991) ("[T]he decision of *Davis* was not clearly foreshadowed"); *Bass* v. *State*, 302 S. C. 250, 256, 395 S. E. 2d 171, 174 (1990) (*Davis* "established a new principle of law"); *Bohn* v. *Waddell*, 164 Ariz. 74, 92, 790 P. 2d 772, 790 (1990) (*Davis* "established a new principle of law"); Note, Rejection of the "Similarly Situated Taxpayer" Rationale: *Davis v. Michigan Department of Treasury*, 43 Tax Lawyer 431, 441 (1990) ("The majority in *Davis* rejected a long-standing doctrine").

those who do business with it. The income tax at issue in *Davis*, however, did not appear discriminatory on its face. Like the Virginia income tax at issue here, it did not single out federal employees or retirees for disfavored treatment. Instead, federal retirees were treated identically to all other retirees, with a single and numerically insignificant exception—retirees whose retirement benefits were paid by the State. Whether such an exception rendered the tax "discriminatory" within the meaning of the intergovernmental immunity doctrine, it seems to me, was an open question. On the one hand, the tax scheme did distinguish between federal retirees and state retirees: The former were required to pay state taxes on their retirement income, while the latter were not. But it was far from clear that such was the proper comparison. In fact, there were strong arguments that it was not.

As JUSTICE STEVENS explained more thoroughly in his *Davis* dissent, 489 U. S., at 819—and as we have recognized since *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819)—intergovernmental immunity is necessary to prevent the States from interfering with federal interests through taxation. Because the National Government has no recourse to the state ballot box, it has only a limited ability to protect itself against excessive state taxes. But the risk of excessive taxation of federal interests is eliminated, and "[a] 'political check' is provided, when a state tax falls" not only on the Federal Government, but also "*on a significant group of state citizens* who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Washington* v. *United States*, 460 U. S. 536, 545 (1983) (emphasis added). Accord, *United States* v. *County of Fresno*, 429 U. S. 452, 462–464 (1977); *South Carolina* v. *Baker*, 485 U. S. 505, 526, n. 15 (1988).

There can be no doubt that the taxation scheme at issue in *Davis* and the one employed by the Commonwealth of

Virginia provided that necessary "political check." They exempted only a small group of citizens, state retirees, while subjecting the remainder of their citizens—federal retirees, retirees who receive income from private sources, and nonretirees alike—to a uniform income tax. As a result, any attempt to increase income taxes excessively so as to interfere with federal interests would have caused the similarly taxed populace to "use their votes" to protect their interests, thereby protecting the interests of the Federal Government as well. There being no risk of abusive taxation of the National Government, there was a good argument that there should have been no intergovernmental immunity problem either. See *Davis*, 489 U. S., at 821–824 (STEVENS, J., dissenting).

In addition, distinguishing between taxation of state retirees and all others, including private and federal retirees, was justifiable from an economic standpoint. The State, after all, does not merely collect taxes from its retirees; it pays their benefits as well. As a result, it makes no difference to the State or the retirees whether the State increases state retirement benefits in an amount sufficient to cover taxes it imposes, or whether the State offers reduced benefits and makes them tax free. The net income level of the retirees and the impact on the state fisc is the same. Thus, the Michigan Department of Taxation had a good argument that its differential treatment of state and federal retirees was "directly related to, and justified by, [a] significant differenc[e] between the two classes," *id.*, at 816 (internal quotation marks omitted): Taxing federal retirees enhances the State's fisc, whereas taxing state retirees does not.

I recite these arguments not to show that the decision in *Davis* was wrong—I joined the opinion then and remain of the view that it was correct—but instead to point out that the arguments on the other side were substantial. Of course, the Court was able to "ancho[r] its decision in precedent," *ante*, at 112 (KENNEDY, J., concurring in part and con-

curring in judgment). But surely that cannot be dispositive. Few decisions are so novel that there is no precedent to which they may be moored. What is determinative is that the decision was "sufficiently debatable" *ex ante* that, under *Chevron Oil*, nonretroactivity cannot be precluded. *Arizona Governing Committee* v. *Norris*, 463 U. S., at 1109 (O'CONNOR, J., concurring). That, it seems to me, is the case here.

2

The second *Chevron Oil* factor is whether denying the rule retroactive application will retard its operation in light of the rule's history, purpose, and effect. 404 U. S., at 107. That factor overwhelmingly favors respondent. The purpose of the intergovernmental immunity doctrine is to protect the rights of the Federal Sovereign against state interference. It does not protect the private rights of individuals:

> "[T]he purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government . . . , but to prevent undue interference with the one government by imposing on it the tax burdens of the other." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 483–484 (1939) (footnote omitted).

Accord, *Davis*, *supra*, at 814 ("[I]ntergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other"). Affording petitioners retroactive relief in this case would not vindicate the interests of the Federal Government. Instead, it lines the pockets of the Government's former employees. It therefore comes as no surprise that the United States, despite its consistent participation in intergovernmental immunity cases in the past, has taken no position here. Because retroactive application of the rule in *Davis* serves petitioners' interests but not the interests intergov-

ernmental immunity was meant to protect—the Federal Government's—denying *Davis* retroactive application would not undermine the decision's purpose or effect.

3

The final factor under *Chevron Oil* is whether the decision "'could produce substantial inequitable results if applied retroactively.'" *Chevron Oil, supra,* at 107 (quoting *Cipriano* v. *City of Houma,* 395 U. S., at 706). We repeatedly have declined to give our decisions retroactive effect where doing so would be unjust. In *Arizona Governing Committee* v. *Norris, supra,* for example, we declined to apply a Title VII decision retroactively, noting that the resulting "unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits." *Id.,* at 1106–1107 (Powell, J., joined by Burger, C. J., BLACKMUN, REHNQUIST, and O'CONNOR, JJ.). There was "no justification" for "impos[ing] this magnitude of burden retroactively on the public," we concluded. *Id.,* at 1107. Accord, *id.,* at 1107–1111 (O'CONNOR, J., concurring); see *id.,* at 1075 *(per curiam).* Similarly, we declined to afford the plaintiff full retroactive relief in *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U. S. 702, 718–723 (1978) (STEVENS, J.). There, too, we explained that "[r]etroactive liability could be devastating" and that "[t]he harm would fall in large part on innocent third parties." *Id.,* at 722–723.

Those same considerations exist here. Retroactive application of rulings that invalidate state tax laws have the potential for producing "disruptive consequences for the State[s] and [their] citizens. A refund, if required by state or federal law, could deplete the state treasur[ies], thus threatening the State[s'] current operations and future plans." *American Trucking Assns., Inc.* v. *Smith,* 496 U. S., at 182 (plurality opinion). Retroactive application of *Davis* is no exception. "The fiscal implications of *Davis* for the

[S]tates," one commentator has noted, "are truly staggering." Hellerstein, Preliminary Reflections on McKesson and American Trucking Associations, 48 Tax Notes 325, 336 (1990). The States estimate that their total liability will exceed $1.8 billion. Brief for Respondent SA–1; Brief for State of Utah et al. as *Amici Curiae* 12–13. Virginia's share alone exceeds $440 million. Brief for Respondent SA–1; Brief for State of Utah et al. as *Amici Curiae* 12–13. This massive liability could not come at a worse time. See Wall Street Journal, July 27, 1992, p. A2 ("Most states are in dire fiscal straits, and their deteriorating tax base is making it harder for them to get out, a survey of legislatures indicates"). Accord, *Harper* v. *Virginia Dept. of Taxation*, 241 Va., at 239–240, 401 S. E. 2d, at 873 (such massive liability "would have a potentially disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivery of essential state services"); *Swanson* v. *State*, 329 N. C. 576, 583, 407 S. E. 2d 791, 794 (1991) ("this State is in dire financial straits" and $140 million in refunds would exacerbate it); *Bass* v. *State*, 302 S. C. 250, 256, 395 S. E. 2d 171, 174 (1990) ($200 million in refunds "would impose a severe financial burden on the State and its citizens [and] endanger the financial integrity of the State"). To impose such liability on Virginia and the other States that relied in good faith on their taxation laws, "at a time when most States are struggling to fund even the most basic services, is the height of unfairness." *James B. Beam*, 501 U. S., at 558 (O'CONNOR, J., dissenting).

It cannot be contended that such a burden is justified by the States' conduct, for the liability is entirely disproportionate to the offense. We do not deal with a State that willfully violated the Constitution but rather one that acted entirely in good faith on the basis of an unchallenged statute. Moreover, during the four years in question, the constitutional violation produced a benefit of approximately $8 million to $12 million per year, Tr. of Oral Arg. 33, 36, and that benefit accrued not to the Commonwealth but to individual retirees.

Yet, for that $32 million to $48 million error, the Court now allows the imposition of liability well in excess of $400 million dollars. Such liability is more than just disproportionate; it is unconscionable. Finally and perhaps most important, this burden will not fall on some thoughtless government official or even the group of retirees that benefited from the offending exemption. Instead the burden falls squarely on the backs of the blameless and unexpecting taxpayers of the affected States who, although they profited not at all from the exemption, will now be forced to pay higher taxes and be deprived of essential services.

Petitioners, in contrast, would suffer no hardship if the Court refused to apply *Davis* retroactively. For years, 23 States enforced taxation schemes like the Commonwealth's in good faith, and for years not a single taxpayer objected on intergovernmental immunity grounds. No one put the States on notice that their taxing schemes might be constitutionally suspect. Denying *Davis* retroactive relief thus would not deny petitioners a benefit on which they had relied. It merely would deny them an unanticipated windfall. Because that windfall would come only at the cost of imposing hurtful consequences on innocent taxpayers and the communities in which they live, I believe the substantial inequity of imposing retroactive relief in this case, like the other *Chevron* factors, weighs in favor of denying *Davis* retroactive application.

III

Even if the Court is correct that *Davis* must be applied retroactively in this case, there is the separate question of the *remedy* that must be given. The questions of retroactivity and remedy are analytically distinct. *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 189 (plurality opinion) ("[T]he Court has never equated its retroactivity principles with remedial principles"). As JUSTICE SOUTER explained in *James B. Beam*, *supra*, at 534, retroactivity is a matter of choice of law "[s]ince the question is whether the court

should apply the old rule or the new one." When the retroactivity of a decision of this Court is in issue, the choice-of-law issue is a federal question. *Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 918 (1990) *(per curiam)*.

The question of remedy, however, is quite different. The issue is not whether to apply new law or old law, but what relief should be afforded once the prevailing party has been determined under applicable law. See *James B. Beam*, 501 U. S., at 535 (SOUTER, J.) ("Once a rule is found to apply 'backward,' there may then be a further issue of remedies, *i. e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one"). The question of remedies is in the first instance a question of state law. See *ibid.* ("[T]he remedial inquiry is one governed by state law, at least where the case originates in state court"). In fact, the only federal question regarding remedies is whether the relief afforded is sufficient to comply with the requirements of due process. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 31–52 (1990).

While the issue of retroactivity is properly before us, the question of remedies is not. It does not appear to be within the question presented, which asks only if *Davis* may be applied "nonretroactively so as to defeat federal retirees' entitlement to refunds." Pet. for Cert. i. Moreover, our consideration of the question at this juncture would be inappropriate, as the Supreme Court of Virginia has yet to consider what remedy might be available in light of *Davis*' retroactivity and applicable state law. The Court inexplicably discusses the question at length nonetheless, noting that if the Commonwealth of Virginia provides adequate predeprivation remedies, it is under no obligation to provide full retroactive refunds today. *Ante*, at 100–102.

When courts take it upon themselves to issue helpful guidance in dictum, they risk creating additional confusion by

inadvertently suggesting constitutional absolutes that do not exist. The Court's dictum today follows that course. Amidst its discussion of predeprivation and postdeprivation remedies, the Court asserts that a plaintiff who has been deprived a predeprivation remedy cannot be "confine[d] . . . to prospective relief." *Ante*, at 101, n. 10. I do not believe the Court's assertion to be correct.

Over 20 years ago, Justice Harlan recognized that the equities could be taken into account in determining the appropriate remedy when the Court announces a new rule of constitutional law:

> "To the extent that equitable considerations, for example, 'reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine." *United States* v. *Estate of Donnelly*, 397 U. S. 286, 296 (1970) (concurring opinion).

The commentators appear to be in accord. See Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733 (1991) (urging consideration of novelty and hardship as part of the remedial framework rather than as a question of whether to apply old law or new). In my view, and in light of the Court's revisions to the law of retroactivity, it should be constitutionally permissible for the equities to inform the remedial inquiry. In a particularly compelling case, then, the equities might permit a State to deny taxpayers a full refund despite having refused them predeprivation process.

Indeed, some Members of this Court have argued that we recognized as much long ago. In *American Trucking Assns.*, 496 U. S., at 219–224 (dissenting opinion), JUSTICE STEVENS admitted that this Court repeatedly had applied the *Chevron Oil* factors to preclude the provision of mone-

tary relief. In JUSTICE STEVENS' view, however, *Chevron Oil* determined the question of remedy rather than which law would apply, new or old. See 496 U. S., at 220 (*Chevron Oil* and its progeny "establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice-of-law principle applicable to all cases on direct review"); see also *ante*, at 95, n. 9 (reserving the possibility that *Chevron Oil* governs the question of remedies in federal court). If JUSTICE STEVENS' view or something like it has prevailed today—and it seems that it has—then state and federal courts still retain the ability to exercise their "equitable discretion" in formulating appropriate relief on a federal claim. After all, it would be wholly anomalous to suggest that federal courts are permitted to determine the scope of the remedy by reference to *Chevron Oil*, but that state courts are barred from considering the equities altogether. Not only would that unduly restrict state court "flexibility in the law of remedies," *Estate of Donnelly, supra*, at 297 (Harlan, J., concurring), but it also would turn federalism on its head. I know of no principle of law that permits us to restrict the remedial discretion of state courts without imposing similar restrictions on federal courts. Quite the opposite should be true, as the question of remedies in state court is generally a question of state law in the first instance. *James B. Beam*, 501 U. S., at 535 (SOUTER, J.).

The Court cites only a single case that might be read as precluding courts from considering the equities when selecting the remedy for the violation of a novel constitutional rule. That case is *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, supra*. *Ante*, at 101–102. But, as the controlling opinion in *James B. Beam* explains, *McKesson* cannot be so read. 501 U. S., at 544 ("Nothing we say here [precludes the right] to raise procedural bars to recovery under state law *or demonstrate reliance interests entitled to consideration in determining the nature of the remedy* that must be provided, *a matter with which McKes-*

son did not deal" (emphases added)). Accord, *id.*, at 543 ("[N]othing we say here precludes consideration of individual equities when deciding remedial issues in particular cases"). It is true that the Court in *McKesson* rejected, on due process grounds, the State of Florida's equitable arguments against the requirement of a full refund. But the opinion did not hold that those arguments were irrelevant as a categorical matter. It simply held that the equities in that case were insufficient to support the decision to withhold a remedy. The opinion expressly so states, rejecting the State's equitable arguments as insufficiently "weighty *in these circumstances.*" *McKesson*, 496 U. S., at 45 (emphasis added).

The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional: The State of Florida collected taxes under its Liquor Tax statute even though this Court already had invalidated a "virtually identical" tax. *Id.*, at 46. Given that the State could "hardly claim surprise" that its statute was declared invalid, this Court concluded that the State's reliance on the presumptive validity of its statute was insufficient to preclude monetary relief. *Ibid.* As we explained in *American Trucking Assns.*, the large burden of retroactive relief is "largely irrelevant when a State violates constitutional norms well established under existing precedent." We cited *McKesson* as an example. 496 U. S., at 183 (plurality opinion).

A contrary reading of *McKesson* would be anomalous in light of this Court's immunity jurisprudence. The Federal Government, for example, is absolutely immune from suit absent an express waiver of immunity; and federal officers enjoy at least qualified immunity when sued in a *Bivens* action. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). As a result, an individual who suffers a constitutional deprivation at the hands of a federal officer very well may have no access to backwards-looking (monetary) relief. I do not see why the Due Process Clause would

require a full, backwards-looking compensatory remedy whenever a governmental official reasonably taxes a citizen under what later turns out to be an unconstitutional statute but not where the officer deprives a citizen of her bodily integrity or her life.

In my view, if the Court is going to restrict authority to temper hardship by holding our decisions nonretroactive through the *Chevron Oil* factors, it must afford courts the ability to avoid injustice by taking equity into account when formulating the remedy for violations of novel constitutional rules. See Fallon & Meltzer, 104 Harv. L. Rev. 1733 (1991). Surely the Constitution permits this Court to refuse plaintiffs full backwards-looking relief under *Chevron Oil;* we repeatedly have done so in the past. *American Trucking Assns., supra,* at 188–200 (canvassing the Court's practice); see also *supra,* at 115–116, 129. I therefore see no reason why it would not similarly permit state courts reasonably to consider the equities in the exercise of their sound remedial discretion.

IV

In my view, the correct approach to the retroactivity question before us was articulated in *Chevron Oil* some 22 years ago. By refusing to apply *Chevron Oil* today, the Court not only permits the imposition of grave and gratuitous hardship on the States and their citizens, but also disregards settled precedents central to the fairness and accuracy of our decisional processes. Nor does the Court cast any light on the nature of the regime that will govern from here on. To the contrary, the Court's unnecessary innuendo concerning pure prospectivity and ill-advised dictum regarding remedial issues introduce still greater uncertainty and disorder into this already chaotic area. Because I cannot agree with the Court's decision or the manifestly unjust results it appears to portend, I respectfully dissent.

Syllabus

DARBY ET AL. *v.* CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91–2045. Argued March 22, 1993—Decided June 21, 1993

In a consolidated appeal from decisions by the Department of Housing and Urban Development (HUD) to initiate administrative sanctions against petitioners, an Administrative Law Judge (ALJ) concluded that petitioners should be debarred from participating in federal programs for 18 months. Under HUD regulations, an ALJ's determination "shall be final unless . . . the Secretary . . . within 30 days of receipt of a request decides as a matter of discretion to review the [ALJ's] finding . . . ." 24 CFR § 24.314(c). Neither party sought further administrative review, but petitioners filed suit in the District Court, seeking an injunction and declaration that the sanctions were not in accordance with law within the meaning of the Administrative Procedure Act (APA). Respondents moved to dismiss the complaint on the ground that petitioners, by forgoing the option to seek review by the Secretary, had failed to exhaust their administrative remedies. The court denied the motion and granted summary judgment to petitioners on the merits of the case. The Court of Appeals reversed, holding that the District Court had erred in denying the motion to dismiss.

Held: Federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the APA, where neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. The language of § 10(c) of the APA is explicit that an appeal to "superior agency authority" is a prerequisite to judicial review only when "expressly required by statute" or when the agency requires an appeal "by rule and provides that the [administrative] action is . . . inoperative" pending that review. Since neither the National Housing Act nor applicable HUD regulations mandate further administrative appeals, the ALJ's decision was a "final" agency action subject to judicial review under § 10(c). The lower courts were not free to require further exhaustion of administrative remedies, although the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not gov-

erned by the APA. Nothing in § 10(c)'s legislative history supports a contrary reading. Pp. 143–154.

957 F. 2d 145, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which WHITE, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined.

Steven D. Gordon argued the cause for petitioners. With him on the briefs was *Michael H. Ditton.*

James A. Feldman argued the cause for respondents. With him on the brief were *Acting Solicitor General Bryson, Assistant Attorney General Gerson, Deputy Solicitor General Mahoney,* and *Anthony J. Steinmeyer.*

JUSTICE BLACKMUN delivered the opinion of the Court.*

This case presents the question whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.*, where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. At issue is the relationship between the judicially created doctrine of exhaustion of administrative remedies and the statutory requirements of § 10(c) of the APA.[1]

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*THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part III of this opinion.

[1] Section 10(c), 80 Stat. 392–393, 5 U. S. C. § 704, provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

We note that the statute as codified in the United States Code refers to "any form of reconsiderations," with the last word being in the plu-

I

Petitioner R. Gordon Darby[2] is a self-employed South Carolina real estate developer who specializes in the development and management of multifamily rental projects. In the early 1980's, he began working with Lonnie Garvin, Jr., a mortgage banker, who had developed a plan to enable multifamily developers to obtain single-family mortgage insurance from respondent Department of Housing and Urban Development (HUD). Respondent Secretary of HUD (Secretary) is authorized to provide single-family mortgage insurance under § 203(b) of the National Housing Act, 48 Stat. 1249, as amended, 12 U. S. C. § 1709(b).[3] Although HUD also provides mortgage insurance for multifamily projects under § 207 of the National Housing Act, 12 U. S. C. § 1713, the greater degree of oversight and control over such projects makes it less attractive for investors than the single-family mortgage insurance option.

The principal advantage of Garvin's plan was that it promised to avoid HUD's "Rule of Seven." This rule prevented rental properties from receiving single-family mortgage insurance if the mortgagor already had financial interests in seven or more similar rental properties in the same project

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ral. The version of § 10(c) as currently enacted, however, uses the singular "reconsideration." See this note, *supra*, at 138. We quote the text as enacted in the Statutes at Large. See *Stephan* v. *United States*, 319 U. S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent").

[2] Petitioners include R. Gordon Darby and his affiliate companies: Darby Development Company; Darby Realty Company; Darby Management Company, Inc.; MD Investment; Parkbrook Acres Associates; and Parkbrook Developers.

[3] Although the primary purpose of the § 203(b) insurance program was to facilitate home ownership by owner-occupants, investors were permitted in the early 1980's to obtain single-family insurance under certain conditions. Private investor-owners are no longer eligible for single-family mortgage insurance. See Department of Housing and Urban Development Reform Act of 1989, § 143(b), 103 Stat. 2036.

or subdivision. See 24 CFR § 203.42(a) (1992).[4] Under Garvin's plan, a person seeking financing would use straw purchasers as mortgage insurance applicants. Once the loans were closed, the straw purchasers would transfer title back to the development company. Because no single purchaser at the time of purchase would own more than seven rental properties within the same project, the Rule of Seven appeared not to be violated. HUD employees in South Carolina apparently assured Garvin that his plan was lawful and that he thereby would avoid the limitation of the Rule of Seven.

Darby obtained financing for three separate multiunit projects, and, through Garvin's plan, Darby obtained single-family mortgage insurance from HUD. Although Darby successfully rented the units, a combination of low rents, falling interest rates, and a generally depressed rental market forced him into default in 1988. HUD became responsible for the payment of over $6.6 million in insurance claims.

HUD had become suspicious of Garvin's financing plan as far back as 1983. In 1986, HUD initiated an audit but concluded that neither Darby nor Garvin had done anything wrong or misled HUD personnel. Nevertheless, in June 1989, HUD issued a limited denial of participation (LDP) that prohibited petitioners for one year from participating in any program in South Carolina administered by respondent Assistant Secretary of Housing.[5] Two months later, the Assistant Secretary notified petitioners that HUD was also proposing to debar them from further participation in all HUD

[4] Prior to August 31, 1955, the Rule of Seven apparently had been the Rule of Eleven. See 24 CFR § 203.42 (1982) and 56 Fed. Reg. 27692 (1991).

[5] An LDP precludes its recipient from participating in any HUD "program," which includes "receipt of any benefit or financial assistance through grants or contractual arrangements; benefits or assistance in the form of loan guarantees or insurance; and awards of procurement contracts, notwithstanding any *quid pro quo* given and whether [HUD] gives anything in return." 24 CFR § 24.710(a)(2) (1992).

procurement contracts and in any nonprocurement transaction with any federal agency. See 24 CFR § 24.200 (1992).

Petitioners' appeals of the LDP and of the proposed debarment were consolidated, and an Administrative Law Judge (ALJ) conducted a hearing on the consolidated appeals in December 1989. The judge issued an "Initial Decision and Order" in April 1990, finding that the financing method used by petitioners was "a sham which improperly circumvented the Rule of Seven." App. to Pet. for Cert. 69a. The ALJ concluded, however, that most of the relevant facts had been disclosed to local HUD employees, that petitioners lacked criminal intent, and that Darby himself "genuinely cooperated with HUD to try [to] work out his financial dilemma and avoid foreclosure." *Id.*, at 88a. In light of these mitigating factors, the ALJ concluded that an indefinite debarment would be punitive and that it would serve no legitimate purpose;[6] good cause existed, however, to debar petitioners for a period of 18 months.[7] *Id.*, at 90a.

Under HUD regulations,

> "The hearing officer's determination shall be final unless, pursuant to 24 CFR part 26, the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the hearing officer's determination." 24 CFR § 24.314(c) (1992).

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[6] According to HUD regulations, "[d]ebarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment." 24 CFR § 24.115(b) (1992).

[7] The ALJ calculated the 18-month debarment period from June 19, 1989, the date on which the LDP was imposed. The debarment would last until December 19, 1990.

Neither petitioners nor respondents sought further administrative review of the ALJ's "Initial Decision and Order."

On May 31, 1990, petitioners filed suit in the United States District Court for the District of South Carolina. They sought an injunction and a declaration that the administrative sanctions were imposed for purposes of punishment, in violation of HUD's own debarment regulations, and therefore were "not in accordance with law" within the meaning of § 10(e)(B)(1) of the APA, 5 U. S. C. § 706(2)(A).

Respondents moved to dismiss the complaint on the ground that petitioners, by forgoing the option to seek review by the Secretary, had failed to exhaust administrative remedies. The District Court denied respondents' motion to dismiss, reasoning that the administrative remedy was inadequate and that resort to that remedy would have been futile. App. to Pet. for Cert. 29a. In a subsequent opinion, the District Court granted petitioners' motion for summary judgment, concluding that the "imposition of debarment in this case encroached too heavily on the punitive side of the line, and for those reasons was an abuse of discretion and not in accordance with the law." *Id.*, at 19a.

The Court of Appeals for the Fourth Circuit reversed. *Darby* v. *Kemp*, 957 F. 2d 145 (1992). It recognized that neither the National Housing Act nor HUD regulations expressly mandate exhaustion of administrative remedies prior to filing suit. The court concluded, however, that the District Court had erred in denying respondents' motion to dismiss, because there was no evidence to suggest that further review would have been futile or that the Secretary would have abused his discretion by indefinitely extending the time limitations for review.

The court denied petitioners' petition for rehearing with suggestion for rehearing en banc. See App. to Pet. for Cert. 93a. In order to resolve the tension between this and the APA, as well as to settle a perceived conflict among the

Courts of Appeals,[8] we granted certiorari. 506 U. S. 952 (1992).

II

Section 10(c) of the APA bears the caption "Actions reviewable." It provides in its first two sentences that judicial review is available for "final agency action for which there is no other adequate remedy in a court," and that "preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action." The last sentence of § 10(c) reads:

> "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration [see n. 1, *supra*], or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 80 Stat. 392–393, 5 U. S. C. § 704.

Petitioners argue that this provision means that a litigant seeking judicial review of a final agency action under the APA need not exhaust available administrative remedies unless such exhaustion is expressly required by statute or agency rule. According to petitioners, since § 10(c) contains an explicit exhaustion provision, federal courts are not free to require further exhaustion as a matter of judicial discretion.

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[8] The Fourth Circuit's ruling in this case appears to be consistent with *Montgomery* v. *Rumsfeld*, 572 F. 2d 250, 253–254 (CA9 1978), and *Missouri* v. *Bowen*, 813 F. 2d 864 (CA8 1987), but is in considerable tension with *United States* v. *Consolidated Mines & Smelting Co.*, 455 F. 2d 432, 439–440 (CA9 1971); *New England Coalition on Nuclear Pollution* v. *United States Nuclear Regulatory Comm'n*, 582 F. 2d 87, 99 (CA1 1978); and *Gulf Oil Corp.* v. *United States Dept. of Energy*, 214 U. S. App. D. C. 119, 131, and n. 73, 663 F. 2d 296, 308, and n. 73 (1981).

Respondents contend that § 10(c) is concerned solely with timing, that is, when agency actions become "final," and that Congress had no intention to interfere with the courts' ability to impose conditions on the timing of their exercise of jurisdiction to review final agency actions. Respondents concede that petitioners' claim is "final" under § 10(c), for neither the National Housing Act nor applicable HUD regulations require that a litigant pursue further administrative appeals prior to seeking judicial review. However, even though nothing in § 10(c) precludes judicial review of petitioners' claim, respondents argue that federal courts remain free under the APA to impose appropriate exhaustion requirements.[9]

We have recognized that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality:

> "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 193 (1985).

Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for "[o]f

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[9] Respondents also have argued that under HUD regulations, petitioners' debarment remains "inoperative" pending review by the Secretary. See 48 Fed. Reg. 43304 (1983). But this fact alone is insufficient under § 10(c) to mandate exhaustion prior to judicial review, for the agency also must require such exhaustion by rule. Respondents concede that HUD imposes no such exhaustion requirement. Brief for Respondents 31.

'paramount importance' to any exhaustion inquiry is congressional intent," *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992), quoting *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, 501 (1982). We therefore must consider whether § 10(c), by providing the conditions under which agency action becomes "final for the purposes of" judicial review, limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review.

It perhaps is surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question. Professor Davis noted in 1958 that § 10(c) had been almost completely ignored in judicial opinions, see 3 K. Davis, Administrative Law Treatise § 20.08, p. 101 (1958); he reiterated that observation 25 years later, noting that the "provision is relevant in hundreds of cases and is customarily overlooked." 4 K. Davis, Administrative Law Treatise § 26.12, pp. 468–469 (2d ed. 1983). Only a handful of opinions in the Courts of Appeals have considered the effect of § 10(c) on the general exhaustion doctrine. See n. 8, *supra*.

This Court has had occasion, however, to consider § 10(c) in other contexts. For example, in *ICC* v. *Locomotive Engineers*, 482 U. S. 270 (1987), we recognized that the plain language of § 10(c), which provides that an agency action is final "whether or not there has been presented or determined an application" for any form of reconsideration, could be read to suggest that the agency action is final regardless whether a motion for reconsideration has been filed. We noted, however, that § 10(c) "has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute—see, *e. g.*, 15 U. S. C. §§ 717r, 3416(a)), but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal" (emphasis in original). *Id.*, at 284–285.

In *Bowen* v. *Massachusetts*, 487 U. S. 879 (1988), we were concerned with whether relief available in the Claims Court was an "adequate remedy in a court" so as to preclude review in Federal District Court of a final agency action under the first sentence of § 10(c). We concluded that "although the primary thrust of [§ 10(c)] was to codify the exhaustion requirement," *id.*, at 903, Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions.

While some dicta in these cases might be claimed to lend support to respondents' interpretation of § 10(c), the text of the APA leaves little doubt that petitioners are correct. Under § 10(a) of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof.*" 5 U. S. C. § 702 (emphasis added). Although § 10(a) provides the general right to judicial review of agency actions under the APA, § 10(c) establishes when such review is available. When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is "final for the purposes of this section" and therefore "subject to judicial review" under the first sentence. While federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, § 10(c), by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.

The last sentence of § 10(c) refers explicitly to "any form of reconsideration" and "an appeal to superior agency authority." Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available. If courts were able to impose additional exhaustion requirements be-

yond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense. To adopt respondents' reading would transform § 10(c) from a provision designed to "'remove obstacles to judicial review of agency action,'" *Bowen* v. *Massachusetts*, 487 U. S., at 904, quoting *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51 (1955), into a trap for unwary litigants. Section 10(c) explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well.

III

Recourse to the legislative history of § 10(c) is unnecessary in light of the plain meaning of the statutory text. Nevertheless, we consider that history briefly because both sides have spent much of their time arguing about its implications. In its report on the APA, the Senate Judiciary Committee explained that the last sentence of § 10(c) was "designed to implement the provisions of section 8(a)." Section 8(a), now codified, as amended, as 5 U. S. C. § 557(b), provides, unless the agency requires otherwise, that an initial decision made by a hearing officer "becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." The Judiciary Committee explained:

> "[A]n agency may permit an examiner to make the initial decision in a case, which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. For that reason this subsection [§ 10(c)] permits an agency also to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inopera-

> tive) before resorting to the courts. In no case may appeal to 'superior agency authority' be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective." S. Rep. No. 752, 79th Cong., 1st Sess., 27 (1945); Administrative Procedure Act: Legislative History 1944–1946, S. Doc. No. 248, 79th Cong., 2d Sess., 213 (1946) (hereinafter Leg. Hist.).

In a statement appended to a letter dated October 19, 1945, to the Judiciary Committee, Attorney General Tom C. Clark set forth his understanding of the effect of § 10(c):

> "This subsection states (subject to the provisions of section 10(a)) the acts which are reviewable under section 10. It is intended to state existing law. The last sentence makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applied only (1) where expressly required by statute . . . or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review." *Id.*, at 44, Leg. Hist. 230.[10]

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[10] In his manual on the APA, prepared in 1947, to which we have given some deference, see, *e. g.*, *Steadman* v. *SEC*, 450 U. S. 91, 103, n. 22 (1981); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978), Attorney General Clark reiterated the Department of Justice's view that § 10(c) "embodies the doctrine of exhaustion of administrative remedies. . . . Agency action which is finally operative and decisive is reviewable." Attorney General's Manual on the Administrative Procedure Act 103 (1947). See also H. R. Rep. No. 1980, 79th Cong., 2d Sess., 55, n. 21 (1946); Leg. Hist. 289, n. 21 (describing

Respondents place great weight on the Attorney General's statement that § 10(c) "is intended to state existing law." That law, according to respondents, "plainly permitted federal courts to require exhaustion of adequate administrative remedies." Brief for Respondents 19–20. We cannot agree with this categorical pronouncement. With respect to the exhaustion of motions for administrative reconsideration or rehearing, the trend in pre-APA cases was in the opposite direction. In *Vandalia R. Co.* v. *Public Serv. Comm'n of Ind.*, 242 U. S. 255 (1916), for example, this Court invoked the "general rule" that "one aggrieved by the rulings of such an administrative tribunal may not complain that the Constitution of the United States has been violated if he has not availed himself of the remedies prescribed by the state law for a rectification of such rulings." *Id.*, at 261. The state law provided only that the Railroad Commission had the authority to grant a rehearing; it did not require that a rehearing be sought. Nevertheless, "since the record shows that plaintiff in error and its associates were accorded a rehearing upon the very question of modification, but abandoned it, nothing more need be said upon that point." *Ibid.*

Seven years later, in *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 48 (1923), without even mentioning the *Vandalia* case, the Court stated:

> "It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commission Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reasons therefor appear . . . . As the law does not require an application for a rehearing

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agency's authority to adopt rules requiring a party to take a timely appeal to the agency prior to seeking judicial review as "an application of the time-honored doctrine of exhaustion of administrative remedies").

> to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order."

Accord, *Banton* v. *Belt Line R. Corp.*, 268 U. S. 413, 416–417 (1925) ("No application to the commission for relief was required by the state law. None was necessary as a condition precedent to the suit").

Shortly before Congress adopted the APA, the Court, in *Levers* v. *Anderson*, 326 U. S. 219 (1945), held that where a federal statute provides that a district supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue "*may* hear the application" for a rehearing of an order denying certain liquor permits, such an application was not a prerequisite to judicial review. Nothing "persuades us that the 'may' means must, or that the Supervisors were required to hear oral argument." *Id.*, at 223 (emphasis added). Despite the fact that the regulations permitted a stay pending the motion for reconsideration, the Court concluded that "the motion is in its effect so much like the normal, formal type of motion for rehearing that we cannot read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress." *Id.*, at 224.

Respondents in effect concede that the trend in the law prior to the enactment of the APA was to require exhaustion of motions for administrative reconsideration or rehearing only when explicitly mandated by statute. Respondents argue, however, that the law governing the exhaustion of administrative *appeals* prior to the APA was significantly different from § 10(c) as petitioners would have us interpret it. Brief for Respondents 23. Respondents rely on *United States* v. *Sing Tuck*, 194 U. S. 161 (1904), in which the Court considered whether, under the relevant statute, an aggrieved party had to appeal an adverse decision by the Inspector of Immigration to the Secretary of Commerce and Labor before

judicial review would be available.[11] It recognized that the relevant statute "points out a mode of procedure which must be followed before there can be a resort to the courts," *id.*, at 167, and that a party must go through "the preliminary sifting process provided by the statutes," *id.*, at 170. Accord, *Chicago, M., St. P. & P. R. Co.* v. *Risty*, 276 U. S. 567, 574–575 (1928).[12]

Nothing in this pre-APA history, however, supports respondents' argument that initial decisions that were "final" for purposes of judicial review were nonetheless unreviewable unless and until an administrative appeal was taken. The pre-APA cases concerning judicial review of federal agency action stand for the simple proposition that, until an administrative appeal was taken, the agency action was unreviewable because it was not yet "final." This is hardly surprising, given the fact that few, if any, administrative agencies authorized hearing officers to make final agency decisions prior to the enactment of the APA. See Federal Administrative Law Developments—1971, 1972 Duke L. J. 115, 295, n. 22 ("[P]rior to the passage of the APA, the existing agencies ordinarily lacked the authority to make binding de-

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[11] The Act of August 18, 1894, 28 Stat. 390, provided: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of [Commerce and Labor]."

[12] In an address to the American Bar Association in 1940, Dean Stason of the University of Michigan Law School summarized the law on exhaustion of administrative appeals: "In the event that a statute setting up an administrative tribunal also creates one or more appellate administrative tribunals, it is almost invariably held that a party who is aggrieved by action of the initial agency must first seek relief by recourse to the appellate agency or agencies." Stason, Timing of Judicial Redress from Erroneous Administrative Action, 25 Minn. L. Rev. 560, 570 (1941). See also 4 K. Davis, Administrative Law Treatise § 26.12, p. 469 (2d ed. 1983) ("The pre-1946 law was established that an appeal to higher administrative authorities was a prerequisite to judicial review").

terminations at a level below that of the agency board or commission, so that section 10(c) would be expected to affect the exhaustion doctrine in only a very limited number of instances").

The purpose of § 10(c) was to permit agencies to require an appeal to "superior agency authority" before an examiner's initial decision became final. This was necessary because, under § 8(a), initial decisions could become final agency decisions in the absence of an agency appeal. See 5 U. S. C. § 557(b). Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be "inoperative" pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.

Respondents also purport to find support for their view in the text and legislative history of the 1976 amendments of the APA. After eliminating the defense of sovereign immunity in APA cases, Congress provided: "Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," Pub. L. 94–574, § 1, 90 Stat. 2721 (codified as 5 U. S. C. § 702). According to respondents, Congress intended by this proviso to ensure that the judicial doctrine of exhaustion of administrative remedies would continue to apply under the APA to permit federal courts to refuse to review agency actions that were nonetheless final under § 10(c). See S. Rep. No. 94–996, p. 11 (1976) (among the limitations on judicial review that remained unaffected by the 1976 amendments was the "failure to exhaust administrative remedies").[13]

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[13] Respondents also rely on then-Assistant Attorney General Scalia's letter to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure where he wrote that the Department of Justice supported the amendment in large part because it expected that many (or most) of the cases disposed of on the basis of sovereign immunity could

Putting to one side the obvious problems with relying on postenactment legislative history, see, *e. g.*, *United States* v. *Texas*, 507 U. S. 529, 535, n. 4 (1993); *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990), the proviso was added in 1976 simply to make clear that "[a]ll other than the law of sovereign immunity remain unchanged," S. Rep. No. 94–996, at 11. The elimination of the defense of sovereign immunity did not affect any other limitation on judicial review that would otherwise apply under the APA. As already discussed, the exhaustion doctrine continues to exist under the APA to the extent that it is required by statute or by agency rule as a prerequisite to judicial review. Therefore, there is nothing inconsistent between the 1976 amendments to the APA and our reading of § 10(c).

IV

We noted just last Term in a non-APA case that

> "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy* v. *Madigan*, 503 U. S., at 144.

Appropriate deference in this case requires the recognition that, with respect to actions brought under the APA, Congress effectively codified the doctrine of exhaustion of administrative remedies in § 10(c). Of course, the exhaustion

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have been decided the same way on other legal grounds such as the failure to exhaust administrative remedies. S. Rep. No. 94–996, pp. 25–26 (1976). See also 1 Recommendations and Reports of the Administrative Conference of the United States 222 (1968–1970) (urging Congress to adopt the very language that was eventually incorporated verbatim into the 1976 amendment so that "the abolition of sovereign immunity will not result in undue judicial interference with governmental operations or a flood of burdensome litigation").

doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA. But where the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under § 10(c).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 92–344. Argued March 2, 1993—Decided June 21, 1993

An Executive Order directs the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualify as refugees, but "authorize[s] [such forced repatriation] to be undertaken only beyond the territorial sea of the United States." Respondents, organizations representing interdicted Haitians and a number of Haitians, sought a temporary restraining order, contending that the Executive Order violates § 243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act) and Article 33 of the United Nations Convention Relating to the Status of Refugees. The District Court denied relief, concluding that § 243(h)(1) does not protect aliens in international waters and that the Convention's provisions are not self-executing. In reversing, the Court of Appeals held, *inter alia*, that § 243(h)(1) does not apply only to aliens within the United States and that Article 33, like the statute, covers *all* refugees, regardless of location.

Held: Neither § 243(h) nor Article 33 limits the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas. Pp. 170–188.

(a) The INA's text and structure demonstrate that § 243(h)(1)—which provides that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country . . ."—applies only in the context of the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States. In the light of other INA provisions that expressly confer upon the President and other officials certain responsibilities under the immigration laws, § 243(h)(1)'s reference to the Attorney General cannot reasonably be construed to describe either the President or the Coast Guard. Moreover, the reference suggests that the section applies only to the Attorney General's normal responsibilities under the INA, particularly her conduct of deportation and exclusion hearings in which requests for asylum or for withholding of deportation under § 243(h) are ordinarily advanced. Since the INA nowhere pro-

vides for the conduct of such proceedings outside the United States, since Part V of the Act, in which § 243 is located, obviously contemplates that they be held in this country, and since it is presumed that Acts of Congress do not ordinarily apply outside the borders, see, *e. g.*, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, § 243(h)(1) must be construed to apply only within United States territory. That the word "return" in § 243(h)(1) is not limited to aliens in this country does not render the section applicable extraterritorially, since it must reasonably be concluded that Congress used the phrase "deport or return" only to make the section's protection available both in proceedings to deport aliens already in the country and proceedings to exclude those already at the border. Pp. 171–174.

(b) The history of the Refugee Act of 1980—which amended § 243(h)(1) by adding the phrase "or return" and deleting the phrase "within the United States" following "any alien"—confirms that § 243(h) does not have extraterritorial application. The foregoing are the only relevant changes made by the 1980 amendment, and they are fully explained by the intent, plainly identified in the legislative history, to apply § 243(h) to exclusion as well as to deportation proceedings. There is no change in the 1980 amendment, however, that could only be explained by an assumption that Congress also intended to provide for the statute's extraterritorial application. It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Pp. 174–177.

(c) Article 33's text—which provides that "[n]o . . . State shall expel or return *('refouler')* a refugee . . . to . . . territories where his life or freedom would be threatened . . . ," Article 33.1, and that "[t]he benefit of the present provision may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is [located]," Article 33.2—affirmatively indicates that it was not intended to have extraterritorial effect. First, if Article 33.1 applied on the high seas, Article 33.2 would create an absurd anomaly: Dangerous aliens in extraterritorial waters would be entitled to 33.1's benefits because they would not be in any "country" under 33.2, while dangerous aliens residing in the country that sought to expel them would not be so entitled. It is more reasonable to assume that 33.2's coverage was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory. Second, Article 33.1's use of the words "expel or return" as an obvious parallel to the words "deport or return" in § 243(h)(1) suggests that "return" in 33.1 refers to exclusion proceedings, see *Leng May Ma* v. *Barber*, 357 U. S. 185, 187, and therefore has a legal meaning narrower than its common meaning. This suggestion is reinforced by the parenthetical reference to the French word *"refouler,"*

Syllabus

which is *not* an exact synonym for the English word "return," but has been interpreted by respected dictionaries to mean, among other things, "expel." Although gathering fleeing refugees and returning them to the one country they had desperately sought to escape may violate the spirit of Article 33, general humanitarian intent cannot impose uncontemplated obligations on treaty signatories. Pp. 179–183.

(d) Although not dispositive, the Convention's negotiating history—which indicates, *inter alia*, that the right of *non-refoulement* applies only to aliens physically present in the host country, that the term "*refouler*" was included in Article 33 to avoid concern about an inappropriately broad reading of the word "return," and that the Convention's limited reach resulted from a hard-fought bargain—solidly supports the foregoing conclusion. Pp. 184–187.

969 F. 2d 1350, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 188.

Deputy Solicitor General Mahoney argued the cause for petitioners. With her on the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Paul T. Cappuccio, Edwin S. Kneedler, Michael Jay Singer*, and *Edwin D. Williamson*.

Harold Hongju Koh argued the cause for respondents. With him on the brief were *Drew S. Days III, Geoffrey C. Hazard, Jr., Paul W. Kahn, Michael Ratner, Cyrus R. Vance, Joseph Tringali, Lucas Guttentag, Judy Rabinovitz*, and *Robert Rubin*.*

**William W. Chip, Timothy J. Cooney*, and *Alan C. Nelson* filed a brief for the Federation for American Immigration Reform as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Immigration Lawyers Association et al. by *Lory D. Rosenberg;* for the American Jewish Committee et al. by *David Martin, Samuel Rabinove*, and *Steven M. Freeman;* for Amnesty International et al. by *Bartram Brown* and *Paul Hoffman;* for the Association of the Bar of the City of New York by *Michael Lesch, John D. Feerick, Sidney S. Rosdeitcher*, and *Robert P. Lewis;* for Human Rights Watch by *Kenneth Roth, Karen Musalo*, and *Stephen L. Kass;* for the International Human Rights Law Group by *William T. Lake, Carol F. Lee, W. Hardy Callcott, Steven*

JUSTICE STEVENS delivered the opinion of the Court.

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, "authorized to be undertaken only beyond the territorial sea of the United States,"[1] violates §243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act).[2]

M. Schneebaum, and *Janelle M. Diller;* for the Lawyers Committee for Human Rights by *Arthur C. Helton*, *William G. O'Neill*, *O. Thomas Johnson, Jr.*, *Andrew I. Schoenholtz*, and *Carlos M. Vasquez;* for the National Association for the Advancement of Colored People et al. by *Wade J. Henderson*, *Laurel Pyke Mason*, and *Luther Zeigler;* for the Office of the United Nations High Commissioner for Refugees by *Joseph R. Guerra*, *Julian Fleet*, and *Ralph G. Steinhardt;* and for Senator Edward M. Kennedy et al. by *Joshua R. Floum* and *Deborah E. Anker.*

Briefs of *amici curiae* were filed for the Haitian Service Organizations et al. by *Terry Helbush;* and for Nicholas deB. Katzenbach et al. by *Michael W. McConnell.*

[1] This language appears in both Executive Order No. 12324, 3 CFR 181 (1981–1983 Comp.), issued by President Reagan, and Executive Order No. 12807, 57 Fed. Reg. 21133 (1992), issued by President Bush.

[2] Title 8 U. S. C. §1253(h) (1988 ed. and Supp. IV), as amended by §203(e) of the Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 107. Section 243(h)(1) provides:

"(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

Section 243(h)(2), 8 U. S. C. §1253(h)(2), provides, in part:

"(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

. . . . .

"(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States."

Before its amendment in 1965, §243(h), 66 Stat. 214, read as follows:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien

We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees[3] applies to action taken by the Coast Guard on the high seas.

I

Aliens residing illegally in the United States are subject to deportation after a formal hearing.[4] Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States.[5] In either a deportation or exclusion proceeding the alien may seek asylum as a political refugee for whom removal to a particular country may threaten his life or freedom. Requests that the Attorney General grant asylum or withhold deportation to a particular country are typically, but not necessarily, advanced as parallel claims in either a deportation or an exclusion proceeding.[6] When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum pursuant to § 208 of the Act. If the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country because of his political or religious beliefs, under § 243(h) the Attorney General must not send him to that

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would be subject to physical persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason." 8 U. S. C. § 1253(h) (1964 ed., Supp. IV); see also *INS* v. *Stevic*, 467 U. S. 407, 414, n. 6 (1984).

[3] Jan. 31, 1967, 19 U. S. T. 6223, T. I. A. S. No. 6577.

[4] 8 U. S. C. § 1252 (1988 ed. and Supp. IV).

[5] 8 U. S. C. § 1226. Although such aliens are located within the United States, the INA (in its use of the term exclusion) treats them as though they had never been admitted; § 1226(a), for example, says that the special inquiry officer shall determine "whether an arriving alien . . . shall be allowed to enter or shall be excluded and deported." Aliens subject to either deportation or exclusion are eventually subjected to a physical act referred to as "deportation," but we shall refer, as immigration law generally refers, to the former as "deportables" and the latter as "excludables."

[6] See *INS* v. *Stevic*, 467 U. S., at 423, n. 18.

country.[7] The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the United States. For 12 years, in one form or another, the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those protections.

On September 23, 1981, the United States and the Republic of Haiti entered into an agreement authorizing the United States Coast Guard to intercept vessels engaged in the illegal transportation of undocumented aliens to our shores. While the parties agreed to prosecute "illegal traffickers," the Haitian Government also guaranteed that its repatriated citizens would not be punished for their illegal departure.[8] The agreement also established that the United States Government would not return any passengers "whom the United States authorities determine[d] to qualify for refugee status." App. 382.

On September 29, 1981, President Reagan issued a proclamation in which he characterized "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States." Presidential Proclamation No. 4865, 3 CFR 50–51 (1981–1983 Comp.). He therefore suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin. His Executive Order expressly "provided, however, that no person who is a refu-

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[7] *Id.*, at 424–425, 426, n. 20.

[8] As a part of that agreement, "the Secretary of State obtained an assurance from the Haitian Government that interdicted Haitians would 'not be subject to prosecution for illegal departure.' See Agreement on Migrants—Interdiction, Sept. 23, 1981, United States-Haiti, 33 U. S. T. 3559, 3560, T. I. A. S. No. 10241." *Department of State* v. *Ray*, 502 U. S. 164, 167–168 (1991).

gee will be returned without his consent." Exec. Order No. 12324, 3 CFR § 2(c)(3), p. 181 (1981–1983 Comp.).[9]

In the ensuing decade, the Coast Guard interdicted approximately 25,000 Haitian migrants.[10] After interviews conducted on board Coast Guard cutters, aliens who were identified as economic migrants were "screened out" and promptly repatriated. Those who made a credible showing of political refugee status were "screened in" and trans-

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[9] That proviso reflected an opinion of the Office of Legal Counsel that Article 33 of the United Nations Convention Relating to the Status of Refugees imposed some procedural obligations on the United States with respect to refugees outside United States territory. That opinion was later withdrawn after consideration was given to the contrary views expressed by the legal adviser to the State Department. See App. 202–230.

[10] *Id.*, at 231. In 1985 the District Court for the District of Columbia upheld the interdiction program, specifically finding that § 243(h) provided relief only to Haitians in the United States. *Haitian Refugee Center, Inc.* v. *Gracey*, 600 F. Supp. 1396, 1406. On appeal from that holding, the Court of Appeals noted that "over 78 vessels carrying more than 1800 Haitians have been interdicted. The government states that it has interviewed all interdicted Haitians and none has presented a bona fide claim to refugee status. Accordingly, to date all interdictees have been returned to Haiti." *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C. 367, 370, 809 F. 2d 794, 797 (1987). The Court affirmed the judgment of the District Court on the ground that the plaintiffs in that case did not have standing, but in a separate opinion Judge Edwards agreed with the District Court on the merits. He concluded that neither the United Nations Protocol nor § 243(h) was "intended to govern parties' conduct outside of their national borders.

. . . . .

"The other best evidence of the meaning of the Protocol may be found in the United States' understanding of it at the time of accession. There can be no doubt that the Executive and the Senate decisions to adhere were made in the belief that the Protocol worked no substantive change in existing immigration law. At that time '[t]he relief authorized by § 243(h) [8 U. S. C. § 1253(h)] was not . . . available to aliens at the border seeking refuge in the United States due to persecution.'" *Id.*, at 413–414, 809 F. 2d, at 840–841 (opinion concurring in part and dissenting in part) (footnotes omitted). See *INS* v. *Stevic*, 467 U. S., at 415.

ported to the United States to file formal applications for asylum. App. 231.[11]

On September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history. As the District Court stated in an uncontested finding of fact, since the military coup "hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding." App. to Pet. for Cert. 144a. Following the coup the Coast Guard suspended repatriations for a period of several weeks, and the United States imposed economic sanctions on Haiti.

On November 18, 1991, the Coast Guard announced that it would resume the program of interdiction and forced repatriation. The following day, the Haitian Refugee Center, Inc., representing a class of interdicted Haitians, filed a complaint in the United States District Court for the Southern District

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[11] A "refugee" as defined in 8 U. S. C. § 1101(a)(42)(A), is entitled to apply for a discretionary grant of asylum pursuant to 8 U. S. C. § 1158. The term "refugee" includes "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."

Section 1158(a) provides: "The Attorney General shall establish a procedure for an alien *physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." (Emphasis added.) This standard for asylum is similar to, but not quite as strict as, the standard applicable to a withholding of deportation pursuant to § 243(h)(1). See generally *INS* v. *Cardoza-Fonseca*, 480 U. S. 421 (1987).

of Florida alleging that the Government had failed to establish and implement adequate procedures to protect Haitians who qualified for asylum. The District Court granted temporary relief that precluded any repatriations until February 4, 1992, when a reversal on appeal in the Court of Appeals for the Eleventh Circuit and a denial of certiorari by this Court effectively terminated that litigation. See *Haitian Refugee Center, Inc.* v. *Baker*, 949 F. 2d 1109 (1991) *(per curiam)*, cert. denied, 502 U. S. 1122 (1992).

In the meantime the Haitian exodus expanded dramatically. During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to accommodate them during the screening process. Those temporary facilities, however, had a capacity of only about 12,500 persons. In the first three weeks of May 1992, the Coast Guard intercepted 127 vessels (many of which were considered unseaworthy, overcrowded, and unsafe); those vessels carried 10,497 undocumented aliens. On May 22, 1992, the United States Navy determined that no additional migrants could safely be accommodated at Guantanamo. App. 231–233.

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration),

but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft.[12] The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in. See *id.*, at 66.

On May 23, 1992, President Bush adopted the second choice.[13] After assuming office, President Clinton decided

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[12] See App. 244–245.

[13] Executive Order No. 12807 reads in relevant part as follows:

"Interdiction of Illegal Aliens

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U. S. C. 1182(f) and 1185(a)(1)), and whereas:

"(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

"(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U. S. T. I. A. S. 6577; 19 U. S. T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

"(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

"(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

"I, GEORGE BUSH, President of the United States of America, hereby order as follows:

. . . . .

"Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appro-

not to modify that order; it remains in effect today. The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration. We

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priate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

. . . . . .

"(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

"(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

"(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

"(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

"(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

. . . . . .

"Sec. 5. This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE

May 24, 1992." 57 Fed. Reg. 23133–23134.

Although the Executive Order itself does not mention Haiti, the press release issued contemporaneously explained:

"President Bush has issued an executive order which will permit the U. S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti. This action follows a large surge in Haitian boat people seeking to enter the United States and is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600-mile sea journey.

"The large number of Haitian migrants has led to a dangerous and unmanageable situation. Both the temporary processing facility at the U. S. Naval base Guantanamo and the Coast Guard cutters on patrol are filled to capacity. The President's action will also allow con-

must decide only whether Executive Order No. 12807, 57 Fed. Reg. 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA.

II

Respondents filed this lawsuit in the United States District Court for the Eastern District of New York on March 18, 1992—before the promulgation of Executive Order No. 12807. The plaintiffs include organizations that represent interdicted Haitians as well as Haitians who were then being detained at Guantanamo. They sued the Commissioner of the Immigration and Naturalization Service, the Attorney General, the Secretary of State, the Commandant of the Coast Guard, and the Commander of the Guantanamo Naval Base, complaining that the screening procedures provided on Coast Guard cutters and at Guantanamo did not adequately protect their statutory and treaty rights to apply for refugee status and avoid repatriation to Haiti.

They alleged that the September 1991 coup had "triggered a continuing widely publicized reign of terror in Haiti"; that over 1,500 Haitians were believed to "have been killed or subjected to violence and destruction of their property because of their political beliefs and affiliations"; and that thousands of Haitian refugees "have set out in small boats that

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tinued orderly processing of more than 12,000 Haitians presently at Guantanamo.

"Through broadcasts on the Voice of America and public statements in the Haitian media we continue to urge Haitians not to attempt the dangerous sea journey to the United States. Last week alone eighteen Haitians perished when their vessel capsized off the Cuban coast.

"Under current circumstances, the safety of Haitians is best assured by remaining in their country. We urge any Haitians who fear persecution to avail themselves of our refugee processing service at our Embassy in Port-au-Prince. The Embassy has been processing refugee claims since February. We utilize this special procedure in only four countries in the world. We are prepared to increase the American embassy staff in Haiti for refugee processing if necessary." App. 327.

are often overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons, braving the hazards of a prolonged journey over high seas in search of safety and freedom." App. 24.

In April, the District Court granted the plaintiffs a preliminary injunction requiring defendants to give Haitians on Guantanamo access to counsel for the screening process. We stayed that order on April 22, 1992, 503 U. S. 1000, and, while the defendants' appeal from it was pending, the President issued the Executive Order now under attack. Plaintiffs then applied for a temporary restraining order to enjoin implementation of the Executive Order. They contended that it violated § 243(h) of the Act and Article 33 of the United Nations Protocol Relating to the Status of Refugees. The District Court denied the application because it concluded that § 243(h) is "unavailable as a source of relief for Haitian aliens in international waters," and that such a statutory provision was necessary because the Protocol's provisions are not "self-executing." App. to Pet. for Cert. 166a–168a.[14]

The Court of Appeals reversed. *Haitian Centers Council, Inc.* v. *McNary*, 969 F. 2d 1350 (CA2 1992). After concluding that the decision of the Eleventh Circuit in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F. 2d 1498 (1992), did not bar its consideration of the issue, the court held that § 243(h)(1) does not apply only to aliens within the United States. The court found its conclusion mandated by both

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[14] This decision was not based on agreement with the Executive's policy. The District Court wrote: "On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit language of the Protocol and dicta in Supreme Court cases such as *INS* v. *Cardoza Fonseca*, 480 U. S. 421 (1987) and *INS* v. *Stevic*, 467 U. S. 407 (1984), the controlling precedent in the Second Circuit is *Bertrand* v. *Sava* which indicates that the Protocols' provisions are not self-executing. *See* 684 F. 2d 204, 218 (2d Cir. 1982)." App. to Pet. for Cert. 166a–167a.

the broad definition of the term "alien" in § 101(a)(3)[15] and the plain language of § 243(h), from which the 1980 amendment had removed the words "within the United States."[16] The court reasoned that the text of the statute defeated the Eleventh Circuit's reliance on the placement of § 243(h)(1) in Part V of the INA (titled "Deportation; Adjustment of Status") as evidence that it applied only to aliens in the United States.[17] Moreover, the Court of Appeals rejected the Government's suggestion that since § 243(h) restricted actions of the Attorney General only, it did not limit the President's

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[15] Section 101(a)(3), 8 U. S. C. § 1101(a)(3), provides: "The term 'alien' means any person not a citizen or national of the United States."

[16] "Before 1980, § 243(h) distinguished between two groups of aliens: those 'within the United States', and all others. After 1980, § 243(h)(1) no longer recognized that distinction, although § 243(h)(2)(C) preserves it for the limited purposes of the 'serious nonpolitical crime' exception. The government's reading would require us to rewrite § 243(h)(1) into its pre-1980 status, but we may not add terms or provisions where congress has omitted them, *see Gregory* v. *Ashcroft*, [501 U. S. 452, 467] (1991); *West Virginia Univ. Hosps., Inc.* v. *Casey*, [499 U. S. 83, 101] (1991), and this restraint is even more compelling when congress has specifically removed a term from a statute: 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.' *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 392–93 . . . (1980) (Stewart, J., dissenting) (quoted with approval in *INS* v. *Cardoza-Fonseca*, 480 U. S. at 442–43 . . .). 'To supply omissions transcends the judicial function.' *Iselin* v. *United States*, 270 U. S. 245, 250 . . . (1926) (Brandeis, J.)." 969 F. 2d, at 1359.

[17] "The statute's location in Part V reflects its original placement there before 1980—when § 243(h) applied by its terms only to 'deportation'. Since 1980, however, § 243(h)(1) has applied to more than just 'deportation'—it applies to 'return' as well (the former is necessarily limited to aliens 'in the United States', the latter applies to all aliens). Thus, § 243, which applies to all aliens, regardless of whereabouts, has broader application than most other portions of Part V, each of which is limited by its terms to aliens 'in' or 'within' the United States; but the fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself." *Id.*, at 1360.

power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas.

Nor did the Court of Appeals accept the Government's reliance on Article 33 of the United Nations Convention Relating to the Status of Refugees.[18] It recognized that the 1980 amendment to the INA had been intended to conform our statutory law to the provisions of the Convention,[19] but it read Article 33.1's prohibition against return, like the statute's, "plainly" to cover "*all* refugees, regardless of location." 969 F. 2d, at 1362. This reading was supported by the "object and purpose" not only of that Article but also of the Convention as a whole.[20] While the Court of Appeals recognized that the negotiating history of the Convention disclosed that the representatives of at least six countries[21] construed the Article more narrowly, it thought that those views might have represented a dissenting position and that, in any event, it would "turn statutory construction on its head" to

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[18] July 28, 1951, 19 U. S. T. 6259, T. I. A. S. No. 6577.

[19] See *INS* v. *Cardoza-Fonseca*, 480 U. S., at 436–437. Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees, which bound the parties to comply with Articles 2 through 34 of the Convention as to persons who had become refugees because of events taking place after January 1, 1951. See *INS* v. *Stevic*, 467 U. S., at 416. Because the Convention established Article 33, and the Protocol merely incorporated it, we shall refer throughout this opinion to the Convention, even though it is the Protocol that applies here.

[20] "One of the considerations stated in the Preamble to the Convention is that the United Nations has 'endeavored to assure refugees the widest possible exercise of . . . fundamental rights and freedoms.' The government's offered reading of Article 33.1, however, would narrow the exercise of those freedoms, since refugees in transit, but not present in a sovereign area, could freely be returned to their persecutors. This would hardly provide refugees with 'the widest possible exercise' of fundamental human rights, and would indeed render Article 33.1 'a cruel hoax.'" 969 F. 2d, at 1363.

[21] The Netherlands, Belgium, the Federal Republic of Germany, Italy, Sweden, and Switzerland. See *id.*, at 1365.

allow ambiguous legislative history to outweigh the Convention's plain text. *Id.*, at 1366.[22]

The Second Circuit's decision conflicted with the Eleventh Circuit's decision in *Haitian Refugee Center* v. *Baker*, 953 F. 2d 1498 (1992), and with the opinion expressed by Judge Edwards in *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C. 367, 410–414, 809 F. 2d 794, 837–841 (1987) (opinion concurring in part and dissenting in part). Because of the manifest importance of the issue, we granted certiorari, 506 U. S. 814 (1992).[23]

III

Both parties argue that the plain language of § 243(h)(1) is dispositive. It reads as follows:

> "The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. § 1253(h)(1) (1988 ed., Supp. IV).

Respondents emphasize the words "any alien" and "return"; neither term is limited to aliens within the United States. Respondents also contend that the 1980 amendment deleting the words "within the United States" from the prior text of § 243(h), see n. 2, *supra*, obviously gave the statute an

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[22] Judge Newman concurred separately, *id.*, at 1368–1369, and Judge Walker dissented, noting that the 1980 amendment eliminating the phrase "within the United States" evidenced only an intent to extend the coverage of § 243(h) to exclusion proceedings because the Court had previously interpreted those words as limiting the section's coverage to deportation proceedings, *id.*, at 1375–1377. See *Leng May Ma* v. *Barber*, 357 U. S. 185, 187–189 (1958); see also *Plyler* v. *Doe*, 457 U. S. 202, 212–213, n. 12 (1982).

[23] On November 30, 1992, we denied respondents' motion to suspend briefing. 506 U. S. 996.

extraterritorial effect. This change, they further argue, was required in order to conform the statute to the text of Article 33.1 of the Convention, which they find as unambiguous as the present statutory text.

Petitioners' response is that a fair reading of the INA as a whole demonstrates that § 243(h) does not apply to actions taken by the President or Coast Guard outside the United States; that the legislative history of the 1980 amendment supports their reading; and that both the text and the negotiating history of Article 33 of the Convention indicate that it was not intended to have any extraterritorial effect.

We shall first review the text and structure of the statute and its 1980 amendment, and then consider the text and negotiating history of the Convention.

A. The Text and Structure of the INA

Although § 243(h)(1) refers only to the Attorney General, the Court of Appeals found it "difficult to believe that the proscription of § 243(h)(1)—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch." 969 F. 2d, at 1360. Congress "understood" that the Attorney General is the "President's agent for dealing with immigration matters," and would intend any reference to her to restrict similar actions of any Government official. *Ibid.* As evidence of this understanding, the court cited 8 U. S. C. § 1103(a). That section, however, conveys to us a different message. It provides, in part:

> "The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, *except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers* . . . ." (Emphasis added.)

Other provisions of the Act expressly confer certain responsibilities on the Secretary of State,[24] the President,[25] and, indeed, on certain other officers as well.[26] The 1981 and 1992 Executive Orders expressly relied on statutory provisions that confer authority on the President to suspend the entry of "any class of aliens" or to "impose on the entry of aliens any restrictions he may deem to be appropriate."[27] We cannot say that the interdiction program created by the President, which the Coast Guard was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone.[28]

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[24] See 8 U. S. C. §§ 1104, 1105, 1153, 1201, and 1202 (1988 ed. and Supp. IV).

[25] See 8 U. S. C. §§ 1157(a), (b), and (d); § 1182(f); §§ 1185(a) and (b); and § 1324a(d) (1988 ed. and Supp. IV).

[26] See §§ 1161(a), (b), and (c) (Secretaries of Agriculture and Labor); § 1188 (Secretary of Labor); § 1421 (federal courts).

[27] Title 8 U. S. C. § 1182(f) provides: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

[28] It is true that Executive Order No. 12807, 57 Fed. Reg. 23133, 23134 (1992), grants the Attorney General certain authority under the interdiction program ("The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the . . . Attorney General . . . shall issue appropriate instructions to the Coast Guard," and "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent"). Under the first phrase, however, any authority the Attorney General retains is subsidiary to that of the Coast Guard's leaders, who give the appropriate commands, and of the Coast Guard itself, which carries them out. As for the second phrase, under neither President Bush nor President Clinton has the Attorney General chosen to exercise those discretionary powers. Even if she had, she would have been carrying out an executive, rather than a legislative, command, and therefore would not necessarily have

The reference to the Attorney General in the statutory text is significant not only because that term cannot reasonably be construed to describe either the President or the Coast Guard, but also because it suggests that it applies only to the Attorney General's normal responsibilities under the INA. The most relevant of those responsibilities for our purposes are her conduct of the deportation and exclusion hearings in which requests for asylum or for withholding of deportation under § 243(h) are ordinarily advanced. Since there is no provision in the statute for the conduct of such proceedings outside the United States, and since Part V and other provisions of the INA[29] obviously contemplate that such proceedings would be held in the country, we cannot reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she has not been authorized to conduct such proceedings. Part V of the INA contains no reference to a possible extraterritorial application.

Even if Part V of the Act were not limited to strictly domestic procedures, the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory. See, *e. g.*, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (citing *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)); *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 585–589, and n. 4 (1992) (STEVENS, J., concurring in judgment); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute"). The Court of Appeals held that the presumption against extraterritoriality had "no relevance in the present context" because there was no risk that § 243(h), which can be enforced only

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been bound by § 243(h)(1). Respondents challenge a program of interdiction and repatriation established by the President and enforced by the Coast Guard.

[29] See, *e. g.*, § 1158(a), quoted in n. 11, *supra*.

in United States courts against the United States Attorney General, would conflict with the laws of other nations. 969 F. 2d, at 1358. We have recently held, however, that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations. *Smith* v. *United States*, 507 U. S. 197, 206–207, n. 5 (1993).

Respondents' expansive interpretation of the word "return" raises another problem: It would make the word "deport" redundant. If "return" referred solely to the destination to which the alien is to be removed, it alone would have been sufficient to encompass aliens involved in both deportation and exclusion proceedings. And if Congress had meant to refer to all aliens who might be sent back to potential oppressors, regardless of their location, the word "deport" would have been unnecessary. By using both words, the statute implies an exclusively territorial application, in the context of both kinds of domestic immigration proceedings. The use of both words reflects the traditional division between the two kinds of aliens and the two kinds of hearings. We can reasonably conclude that Congress used the two words "deport" and "return" only to make § 243(h)'s protection available in both deportation and exclusion proceedings. Indeed, the history of the 1980 amendment confirms that conclusion.

B. The History of the Refugee Act of 1980

As enacted in 1952, § 243(h) authorized the Attorney General to withhold deportation of aliens "within the United States."[30] Six years later we considered the question whether it applied to an alien who had been paroled into the country while her admissibility was being determined. We held that even though she was physically present within our borders, she was not "within the United States" as those words were used in § 243(h). *Leng May Ma* v. *Barber*, 357

[30] 66 Stat. 214; see also n. 2, *supra*.

U. S. 185, 186 (1958).[31] We explained the important distinction between "deportation" or "expulsion," on the one hand, and "exclusion," on the other:

> "It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.' *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953). See *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596 (1953). The distinction was carefully preserved in Title II of the Immigration and Nationality Act." *Id.*, at 187.

Under the INA, both then and now, those seeking "admission" and trying to avoid "exclusion" were already within our territory (or at its border), but the law treated them as though they had never entered the United States at all; they were within United States territory but not "within the United States." Those who had been admitted (or found their way in) but sought to avoid "expulsion" had the added benefit of "deportation proceedings"; they were both within United States territory *and* "within the United States." *Ibid.* Although the phrase "within the United States" presumed the alien's actual presence in the United States, it had more to do with an alien's legal status than with his location.

The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of § 243(h). By adding the word "return" and removing the words "within the United States" from § 243(h), Congress ex-

[31] "We conclude that petitioner's parole did not alter her status as an excluded alien or otherwise bring her 'within the United States' in the meaning of § 243(h)." 357 U. S., at 186.

tended the statute's protection to both types of aliens, but it did nothing to change the presumption that both types of aliens would continue to be found only within United States territory. The removal of the phrase "within the United States" cured the most obvious drawback of § 243(h): As interpreted in *Leng May Ma*, its protection was available only to aliens subject to deportation proceedings.

Of course, in addition to this most obvious purpose, it is possible that the 1980 amendment *also* removed any territorial limitation of the statute, and Congress might have intended a double-barreled result.[32] That possibility, however, is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require. Moreover, in our review of the history of the amendment, we have found no support whatsoever for that latter, alternative, purpose.

The addition of the phrase "or return" and the deletion of the phrase "within the United States" are the only relevant changes made by the 1980 amendment to § 243(h)(1), and they are fully explained by the intent to apply § 243(h) to exclusion as well as to deportation proceedings. That intent is plainly identified in the legislative history of the amendment.[33] There is no change in the 1980 amendment, however, that could only be explained by an assumption that Congress also intended to provide for the statute's extraterritorial application. It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history.

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[32] Even respondents acknowledge that § 243(h) did not apply extraterritorially before its amendment. See Brief for Respondents 9, 12.

[33] See H. R. Rep. No. 96–608, p. 30 (1979) (the changes "require . . . the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation, proceedings"); see also S. Rep. No. 96–256, p. 17 (1979).

In sum, all available evidence about the meaning of § 243(h)—the Government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a dual reference to "deport or return," and the relevance of that dual structure to immigration law in general—leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.

IV

Although the protection afforded by § 243(h) did not apply in exclusion proceedings before 1980, other provisions of the Act did authorize relief for aliens at the border seeking protection as refugees in the United States. See *INS* v. *Stevic*, 467 U. S., at 415–416. When the United States acceded to the Protocol in 1968, therefore, the INA already offered *some* protection to both classes of refugees. It offered *no* such protection to any alien who was beyond the territorial waters of the United States, though, and we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope. Both Congress and the Executive Branch gave extensive consideration to the Protocol before ratifying it in 1968; in all of their published consideration of it there appears no mention of the possibility that the United States was assuming any extraterritorial obligations.[34] Neverthe-

[34] "The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol. *E. g.*, S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968) ('refugees in the United States have long enjoyed the protection and the rights which the protocol calls for'); *id.*, at 6, 7 ('the United States already meets the standards of the Protocol'); see also, *id.*, at 2; S. Exec. K, 90th Cong., 2d Sess., III, VII (1968); 114 Cong. Rec. 29391 (1968) (remarks of Sen. Mansfield); *id.*, at 27757 (remarks of Sen. Proxmire). And it was 'absolutely clear' that the Protocol would not 'requir[e] the United States to admit new categories or

less, because the history of the 1980 Act does disclose a general intent to conform our law to Article 33 of the Convention, it might be argued that the extraterritorial obligations imposed by Article 33 were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. Or, just as the statute might have imposed an extraterritorial obligation that the Convention does not (the argument we have just rejected), the Convention might have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law.[35] With those possibilities in mind we shall consider both the text and negotiating history of the Convention itself.

Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders. Respondents argue that the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders. In spite

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numbers of aliens.' S. Exec. Rep. No. 14, *supra*, at 19. It was also believed that apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language. See, *e. g.*, S. Exec. K, *supra*, at VIII." *INS* v. *Stevic*, 467 U. S., at 417–418.

[35] United States Const., Art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." In *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 117–118 (1804), Chief Justice Marshall wrote that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." See also *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982); *Clark* v. *Allen*, 331 U. S. 503, 508–511 (1947); *Cook* v. *United States*, 288 U. S. 102, 118–120 (1933).

of the moral weight of that argument, both the text and negotiating history of Article 33 affirmatively indicate that it was not intended to have extraterritorial effect.

A. The Text of the Convention

Two aspects of Article 33's text are persuasive. The first is the explicit reference in Article 33.2 to the country in which the alien is located; the second is the parallel use of the terms "expel or return," the latter term explained by the French word "refouler."

The full text of Article 33 reads as follows:

> "*Article 33.—Prohibition of Expulsion or Return ('refoulement')*
>
> "1. No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> "2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of *the country in which he is*, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Convention Relating to the Status of Refugees, July 28, 1951, 19 U. S. T. 6259, 6276, T. I. A. S. No. 6577 (emphasis added).

Under the second paragraph of Article 33 an alien may not claim the benefit of the first paragraph if he poses a danger to the country in which he is located. If the first paragraph did apply on the high seas, no nation could invoke the second paragraph's exception with respect to an alien there: An alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2

would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.[36]

Article 33.1 uses the words "expel or return ('refouler')" as an obvious parallel to the words "deport or return" in § 243(h)(1). There is no dispute that "expel" has the same meaning as "deport"; it refers to the deportation or expulsion of an alien who is already present in the host country. The dual reference identified and explained in our opinion in *Leng May Ma* v. *Barber* suggests that the term "return ('refouler')" refers to the exclusion of aliens who are merely "'on the threshold of initial entry.'" 357 U. S., at 187 (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953)).

This suggestion—that "return" has a legal meaning narrower than its common meaning—is reinforced by the parenthetical reference to "*refouler*," a French word that is *not* an exact synonym for the English word "return." Indeed, neither of two respected English-French dictionaries mentions "*refouler*" as one of many possible French translations

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[36] Although the parallel provision in § 243(h)(2)(D), 8 U. S. C. § 243(h)(2)(D), that was added to the INA in 1980 does not contain the "country in which he is" language, the general understanding that it was intended to conform the statute to the Protocol leads us to give it that reading, particularly since its text is otherwise so similar to Article 33.2. It provides that § 243(h)(1) "shall not apply" to an alien if the Attorney General determines that "there are reasonable grounds for regarding the alien as a danger to the security of the United States." Thus the statutory term "security of the United States" replaces the Protocol's term "security of the country in which he is." The parallel surely implies that for statutory purposes "the United States" is "the country in which he is."

of "return."[37] Conversely, the English translations of "*refouler*" do not include the word "return."[38] They do, however, include words like "repulse," "repel," "drive back," and even "expel." To the extent that they are relevant, these

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[37] The New Cassell's French Dictionary 440 (1973) gives this translation: "return (I) [rĭtə:n], *v.i.* Revenir (to come back); retourner (to go back); rentrer (to come in again); répondre, répliquer (to answer). *To return to the subject*, revenir au sujet, (*fam.*) revenir à ses moutons.—*v.t.* Rendre (to give back); renvoyer (to send back); rembourser (to repay); rapporter (interest); répondre à; rendre compte (to render an account of); élire (candidates). *He was returned*, il fut élu; *the money returns interest*, l'argent rapporte intérêt; *to return good for evil*, rendre le bien pour le mal.—*n.* Retour (coming back, going back), *m.*; rentrée (coming back in), *f.*; renvoi (sending back), *m.*; remise en place (putting back), *f.*; profit, gain (profit), *m.*; restitution (restitution), *f.*; remboursement (reimbursement), *m.*; élection (election), *f.*; rapport, compte rendu, relevé, état (report); (*Comm.* montant des opérations, montant des remises; bilan (of a bank), *m.*; (*pl.*) produit, *m.* *By return of post*, par retour du courrier; *in return for*, en retour de; *nil return*, état néant, *m.*; *on my return*, au retour, comme je revenais chez moi; *on sale or return*, en dépôt, en commission; *return address*, addrese de l'expéditeur, *f.*; *return home*, retour au foyer, *m.*; *return journey*, retour, *m.*; *return match*, revanche, *f.*; *return of casualties*, état des pertes, *m.*; *small profits (and) quick returns*, petits profits, vente rapide; *the official returns*, les relevés officiels, *m.pl.*; *to make some return for*, payer de retour."

Although there are additional translations in the Larousse Modern French-English Dictionary 545 (1978), "refouler" is not among them.

[38] "refouler [rəfúle], *v.t.* To drive back, to back (train etc.); to repel; to compress; to repress, to suppress, to inhibit; to expel (aliens); to refuse entry; to stem (the tide); to tamp; to tread (grapes etc.) again; to full (stuffs) again; to ram home (the charge in a gun). *Refouler la marée*, to stem, to go against the tide.—*v.i.* To ebb, to flow back. *La marée refoule*, the tide is ebbing." Cassell's, at 627.

"refouler [-le] v. tr. (l). To stem (la marée). || NAUT. To stem (un courant). || TECHN. To drive in (une cheville); to deliver (l'eau); to full (une étoffe); to compress (un gaz); to hammer, to fuller (du métal). || MILIT. To repulse (une attaque); to drive back, to repel (l'ennemi); to ram home (un projectile). || PHILOS. To repress (un instinct). || CH. DE F. To back (un train). || FIG. To choke back (un sanglot).

"—v. intr. To flow back (foule); to ebb, to be on the ebb (marée). || MÉD. *Refoulé*, inhibited." Larousse, at 607.

translations imply that "return" means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination. In the context of the Convention, to "return" means to "repulse" rather than to "reinstate."[39]

The text of Article 33 thus fits with Judge Edwards' understanding that "'expulsion' would refer to a 'refugee already admitted into a country' and that 'return' would refer to a 'refugee already within the territory but not yet resident there.' Thus, the Protocol was not intended to govern parties' conduct outside of their national borders." *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C., at 413, 809 F. 2d, at 840 (footnotes omitted). From the time of the Convention, commentators have consistently agreed with this view.[40]

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[39] Under Article 33, after all, a nation is not prevented from sending a threatened refugee back only to his homeland, or even to the country that he has most recently departed; in some cases Article 33 would even prevent a nation from sending a refugee to a country where he had never been. Because the word "return," in its common meaning, would make no sense in that situation (one cannot return, or be returned, to a place one has never been), we think it means something closer to "exclude" than "send back."

[40] See, *e. g.*, N. Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 162–163 (1953) ("The *Study on Statelessness*[, U. N. Dept. of Social Affairs 60 (1949),] defined 'expulsion' as 'the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country' and 'reconduction' (which is the equivalent of 'refoulement' and was changed by the Ad Hoc Committee to the word 'return') as 'the mere physical act of ejecting from the national territory a person residing therein who has gained entry or is residing regularly or irregularly.' . . . Art. 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into [the] territory"); 2 A. Grahl-Madsen, The Status of Refugees in International Law 94 (1972) ("*[Non-refoulement]* may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State. Article 33 only prohibits the expulsion or return *(refoulement)* of refugees to territories where they are likely to suffer perse-

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.[41]

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cution; it does not obligate the Contracting State to admit any person who has not already set foot on their respective territories"). A more recent work describes the evolution of *non-refoulement* into the international (and possibly extraterritorial) duty of nonreturn relied on by respondents, but it also admits that in 1951 *non-refoulement* had a narrower meaning, and did not encompass extraterritorial obligations. Moreover, it describes both "expel" and "return" as terms referring to one nation's transportation of an alien out of its own territory and into another. See G. Goodwin-Gill, The Refugee in International Law 74–76 (1983).

Even the United Nations High Commissioner for Refugees has implicitly acknowledged that the Convention has no extraterritorial application. While conceding that the Convention does not mandate any specific procedure by which to determine whether an alien qualifies as a refugee, the "basic requirements" his office has established impose an exclusively territorial burden, and announce that any alien protected by the Convention (and by its promise of *non-refoulement*) will be found either "'at the border or in the territory of a Contracting State.'" Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979) (quoting Official Records of the General Assembly, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1), paragraph 53(6)(e)). Those basic requirements also establish the right of an applicant for refugee status "'to remain *in the country* pending a decision on his initial request.'" Handbook on Refugee Status, at 460 (emphasis added).

[41] The Convention's failure to prevent the extraterritorial reconduction of aliens has been generally acknowledged (and regretted). See Aga Khan, Legal Problems Relating to Refugees and Displaced Persons, in Hague Academy of Int'l Law, 149 Recueil des Cours 287, 318 (1976) ("Does the *non-refoulement* rule . . . apply . . . only to those already within the

B. The Negotiating History of the Convention

In early drafts of the Convention, what finally emerged as Article 33 was numbered 28. At a negotiating conference of plenipotentiaries held in Geneva, Switzerland, on July 11, 1951, the Swiss delegate explained his understanding that the words "expel" and "return" covered only refugees who had entered the host country. He stated:

> "Mr. ZUTTER (Switzerland) said that the Swiss Federal Government saw no reason why article 28 should not be adopted as it stood; for the article was a necessary one. He thought, however, that its wording left room for various interpretations, particularly as to the meaning to be attached to the words 'expel' and 'return'. In the Swiss Government's view, the term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term '*refoulement*', on the other hand, had a vaguer meaning; *it could not, however, be applied to a refugee who had not yet entered the territory of a country.* The word 'return', used in the English text, gave that idea exactly. Yet article 28 implied the existence of two categories of refugee: refugees who were liable to be expelled, and those who were liable to be returned. In any case, the States represented at the Conference should take a definite position with regard to the meaning to be attached to the word 'return'. The Swiss Government considered that in the

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territory of the Contracting State? . . . There is thus a serious gap in refugee law as established by the 1951 Convention and other related instruments and it is high time that this gap should be filled"); Robinson, Convention Relating to the Status of Refugees, at 163 ("[I]f a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck. It cannot be said that this is a satisfactory solution of the problem of asylum"); Goodwin-Gill, The Refugee in International Law, at 87 ("A categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement*, even though it may result in serious consequences for asylum-seekers").

present instance *the word applied solely to refugees who had already entered a country, but were not yet resident there.* According to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross its frontiers. He would be glad to know whether the States represented at the Conference accepted his interpretations of the two terms in question. If they did, Switzerland would be willing to accept article 28, which was one of the articles in respect of which States could not, under article 36 of the draft Convention, enter a reservation." (Emphases added.)[42]

No one expressed disagreement with the position of the Swiss delegate on that day or at the session two weeks later when Article 28 was again discussed. At that session, the delegate of the Netherlands recalled the Swiss delegate's earlier position:

"Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' *('refoulement')* related to a refugee *already within the territory but not yet resident there.* According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.

"He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

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[42] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting, U. N. Doc. A/CONF.2/SR.16, p. 6 (July 11, 1951).

"At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

"In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

"There being no objection, the PRESIDENT *ruled* that the interpretation given by the Netherlands representative should be placed on record.

"Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word 'return' was the nearest equivalent in English to the French term '*refoulement*'. He assumed that the word 'return' as used in the English text had no wider meaning.

"The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word '*refoulement*' ('*refouler*' in verbal uses) should be included in brackets and between inverted commas after the English word 'return' wherever the latter occurred in the text." (Emphasis added.)[43]

Although the significance of the President's comment that the remarks should be "placed on record" is not entirely clear, this much cannot be denied: At one time there was a "general consensus," and in July 1951 several delegates understood the right of *non-refoulement* to apply only to

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[43] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, U. N. Doc. A/CONF.2/SR.35, pp. 21–22 (July 25, 1951).

aliens physically present in the host country.[44] There is no record of any later disagreement with that position. Moreover, the term "*refouler*" was included in the English version of the text to avoid the expressed concern about an inappropriately broad reading of the English word "return."

Therefore, even if we believed that Executive Order No. 12807 violated the intent of some signatory states to protect all aliens, wherever they might be found, from being transported to potential oppressors, we must acknowledge that other signatory states carefully—and successfully—sought to avoid just that implication. The negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.

V

Respondents contend that the dangers faced by Haitians who are unwillingly repatriated demonstrate that the judgment of the Court of Appeals fulfilled the central purpose of the Convention and the Refugee Act of 1980. While we must, of course, be guided by the high purpose of both the treaty and the statute, we are not persuaded that either one places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States.

It is perfectly clear that 8 U. S. C. § 1182(f), see n. 27, *supra*, grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores. Whether the President's chosen method of preventing the "attempted mass migra-

[44] The Swiss delegate's statement strongly suggests, moreover, that at least one nation's accession to the Convention was *conditioned* on this understanding.

tion" of thousands of Haitians—to use the Dutch delegate's phrase—poses a greater risk of harm to Haitians who might otherwise face a long and dangerous return voyage is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits. As we have already noted, Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). We therefore find ourselves in agreement with the conclusion expressed in Judge Edwards' concurring opinion in *Gracey*, 257 U. S. App. D. C., at 414, 809 F. 2d, at 841:

> "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN, dissenting.

When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U. S. T. 6223, T. I. A. S. No. 6577, it pledged not to "return *('refouler')* a refugee in any manner whatsoever" to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Refugee Act of 1980, 94 Stat. 102. See *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 429, 436–437, 440 (1987); *INS* v. *Stevic*, 467 U. S. 407, 418, 421 (1984). Today's majority nevertheless decides that the forced repatriation of

the Haitian refugees is perfectly legal, because the word "return" does not mean return, *ante*, at 174, 180–182, because the opposite of "within the United States" is not outside the United States, *ante*, at 175, and because the official charged with controlling immigration has no role in enforcing an order to control immigration, *ante*, at 171–173.

I believe that the duty of nonreturn expressed in both the Protocol and the statute is clear. The majority finds it "extraordinary," *ante*, at 176, that Congress would have intended the ban on returning "any alien" to apply to aliens at sea. That Congress would have meant what it said is not remarkable. What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct.

I

I begin with the Convention,[1] for it is undisputed that the Refugee Act of 1980 was passed to conform our law to Article 33, and that "the nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulement* obligations under Article 33.1 . . . ." *INS* v. *Doherty*, 502 U. S. 314, 331 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part). See also *Cardoza-Fonseca*, 480 U. S., at 429, 436–437, 440; *Stevic*, 467 U. S., at 418, 421. The Convention thus constitutes the backdrop against which the statute must be understood.[2]

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[1] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U. S. T. 6259, 189 U. N. T. S. 150, T. I. A. S. No. 6577. Because the Protocol to which the United States acceded incorporated the Convention's Article 33, I shall follow the form of the majority, see *ante*, at 169, n. 19, and shall refer throughout this dissent (unless the distinction is relevant) only to the Convention.

[2] This Court has recognized that Article 33 has independent force. See, *e. g.*, *INS* v. *Stevic*, 467 U. S., at 428–430, n. 22 (By modifying his discretionary practice, Attorney General "'implemented'" and "honor[ed]" the Protocol's requirements). Because I agree with the near-universal under-

A

Article 33.1 of the Convention states categorically and without geographical limitation:

> "No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, see *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C. 367, 809 F. 2d 794 (1987), the Government consistently acknowledged that the Convention applied on the high seas.[3]

The majority, however, has difficulty with the treaty's use of the term "return *('refouler')*." "Return," it claims, does not mean return, but instead has a distinctive legal meaning.

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standing that the obligations imposed by treaty and the statute are coextensive, I do not find it necessary to rely on the Protocol standing alone. As the majority suggests, however, *ante*, at 178, to the extent that the treaty is more generous than the statute, the latter should not be read to limit the former.

[3] See, *e. g.*, 5 Op. Off. Legal Counsel 242, 248 (1981) (under proposed interdiction of Haitian flag vessels, "[i]ndividuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims" under the Convention); United States as a Country of Mass First Asylum: Hearing before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 208–209 (1981) (letter from Office of Attorney General stating: "Aliens who have not reached our borders (such as those on board interdicted vessels) are . . . protected . . . by the U. N. Convention and Protocol"); *id.*, at 4 (statement by Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, regarding the Haitian interdiction program: "I would like to also underscore that we intend fully to carry out our obligations under the U. N. Protocol on the status of refugees").

Ante, at 180. For this proposition the Court relies almost entirely on the fact that *American* law makes a general distinction between *deportation* and *exclusion*. Without explanation, the majority asserts that in light of this distinction the word "return" as used in the treaty somehow must refer only to "the exclusion of aliens who are . . . 'on the threshold of initial entry.'" *Ibid.* (citation omitted).

Setting aside for the moment the fact that respondents in this case seem very much "on the threshold of initial entry"—at least in the eyes of the Government that has ordered them seized for "attempting to come to the United States by sea without necessary documentation," Preamble to Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992)—I find this tortured reading unsupported and unnecessary. The text of the Convention does not ban the "exclusion" of aliens who have reached some indeterminate "threshold"; it bans their "return." It is well settled that a treaty must first be construed according to its "ordinary meaning." Article 31.1 of the Vienna Convention on the Law of Treaties, 1155 U. N. T. S. 331, T. S. No. 58 (1980), 8 I. L. M. 679 (1969). The ordinary meaning of "return" is "to bring, send, or put (a person or thing) back to or in a former position." Webster's Third New International Dictionary 1941 (1986). That describes precisely what petitioners are doing to the Haitians. By dispensing with ordinary meaning at the outset, and by taking instead as its starting point the assumption that "return," as used in the treaty, "has a legal meaning narrower than its common meaning," *ante*, at 180, the majority leads itself astray.

The straightforward interpretation of the duty of nonreturn is strongly reinforced by the Convention's use of the French term "*refouler*." The ordinary meaning of "*refouler*," as the majority concedes, *ante*, at 181–182, is "[t]o repulse, . . . ; to drive back, to repel." Larousse Modern French-

English Dictionary 631 (1981).[4] Thus construed, Article 33.1 of the Convention reads: "No contracting state shall expel or [repulse, drive back, or repel] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . . ." That, of course, is exactly what the Government is doing. It thus is no surprise that when the French press has described the very policy challenged here, the term it has used is *"refouler."* See, *e. g., Le bourbier haïtien,* Le Monde, May 31–June 1, 1992 ("[L]es Etats-Unis ont décidé de refouler directement les réfugiés recueillis par la garde cotièré." (The United States has decided [de refouler] directly the refugees picked up by the Coast Guard)).

And yet the majority insists that what has occurred is not, in fact, *"refoulement."* It reaches this conclusion in a peculiar fashion. After acknowledging that the ordinary meaning of *"refouler"* is "repulse," "repel," and "drive back," the majority without elaboration declares: "To the extent that they are relevant, these translations imply that 'return' means a defensive act of resistance or exclusion at a border . . . ." *Ante,* at 181–182. I am at a loss to find the narrow notion of "exclusion at a border" in broad terms like "repulse," "repel," and "drive back." Gage was repulsed (initially) at Bunker Hill. Lee was repelled at Gettysburg. Rommel was driven back across North Africa. The majority's puzzling progression (*"refouler"* means repel or drive back; therefore "return" means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The text of Article

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[4] The Court seems no more convinced than I am by petitioners' argument that "refouler" is best translated as "expel." See Brief for Petitioners 38–39. That interpretation, as the Second Circuit observed, would leave the treaty redundantly forbidding a nation to "expel" or "expel" a refugee. *Haitian Centers Council, Inc.* v. *McNary,* 969 F. 2d 1350, 1363 (1992).

33.1 is clear, and whether the operative term is "return" or "*refouler*," it prohibits the Government's actions.[5]

Article 33.1 is clear not only in what it says, but also in what it does not say: It does not include any geographical limitation. It limits only where a refugee may be sent "to," not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution.

Article 33.2, by contrast, *does* contain a geographical reference, and the majority seizes upon this as evidence that the section as a whole applies only within a signatory's borders. That inference is flawed. Article 33.2 states that the benefit of Article 33.1

> "may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The signatories' understandable decision to allow nations to deport criminal aliens who have entered their territory hardly suggests an intent to permit the apprehension and return of noncriminal aliens who have not entered their territory, and who may have no desire ever to enter it. One wonders what the majority would make of an exception that

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[5] I am surprised by the majority's apparent belief that (a) the translations of "*refouler*" are of uncertain relevance ("To the extent that they are relevant, these translations imply . . ."), and (b) the term "*refouler*" is pertinent only as an aid to understanding the meaning of the English word "return" ("these translations imply that 'return' means . . ."). *Ante*, at 181–182. The first assumption suggests disregard for the basic rule that consideration of a treaty's ordinary meaning must be the first step in its interpretation. The second assumption, by neglecting to treat the term "*refouler*" as significant in and of itself, overlooks the fact that under Article 46 the French and English versions of the Convention's text are equally authoritative.

removed from the Article's protection all refugees who "constitute a danger to their families." By the majority's logic, the inclusion of such an exception presumably would render Article 33.1 applicable only to refugees with families.

Far from constituting "an absurd anomaly," *ante*, at 180, the fact that a state is permitted to "expel or return" a small class of refugees found within its territory but may not seize and return refugees who remain outside its frontiers expresses precisely the objectives and concerns of the Convention. Nonreturn is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may "expel or return" him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country "in which he is" proves nothing.

B

The majority further relies on a remark by Baron van Boetzelaer, the Netherlands' delegate at the Convention's negotiating conference, to support its contention that Article 33 does not apply extraterritorially. This reliance, for two reasons, is misplaced. First, the isolated statement of a delegate to the Convention cannot alter the plain meaning of the treaty itself. Second, placed in its proper context, Van Boetzelaer's comment does not support the majority's position.

It is axiomatic that a treaty's plain language must control absent "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185 (1982). See also *United States* v. *Stuart*, 489 U. S. 353, 371 (1989) (SCALIA, J., concurring in judgment); *id.*, at 370 (KENNEDY, J., concurring in part and concurring in judgment). Reliance on a treaty's negotiating history *(travaux preparatoires)* is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to "manifestly absurd or unreasonable" results. See Vienna

Convention on the Law of Treaties, Art. 32, 1155 U. N. T. S., at 340, 8 I. L. M., at 692. Moreover, even the general rule of treaty construction allowing limited resort to *travaux preparatoires* "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." *Arizona* v. *California*, 292 U. S. 341, 360 (1934). There is no evidence that the comment on which the majority relies was ever communicated to the United States Government or to the Senate in connection with the ratification of the Protocol.

The pitfalls of relying on the negotiating record are underscored by the fact that Baron van Boetzelaer's remarks almost certainly represent, in the words of the United Nations High Commissioner for Refugees, a mere "parliamentary gesture by a delegate whose views did *not* prevail upon the negotiating conference as a whole" (emphasis in original). Brief for Office of United Nations High Commissioner for Refugees as *Amicus Curiae* 24. The Baron, like the Swiss delegate whose sentiments he restated, expressed a desire to reserve the right to *close borders* to *large groups* of refugees. "According to [the Swiss delegate's] interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross [their] frontiers." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting, U. N. Doc. A/CONF.2/SR.16, p. 6 (July 11, 1951). Article 33, Van Boetzelaer maintained, "would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations" and this was important because "[t]he Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, U. N. Doc. A/CONF.2/SR.35, pp. 21–22 (July 25, 1951) (hereafter A/Conf.2/SR.35).

Yet no one seriously contends that the treaty's protections depend on the number of refugees who are fleeing persecution. Allowing a state to disavow "any obligations" in the case of mass migrations or attempted mass migrations would eviscerate Article 33, leaving it applicable only to "small" migrations and "small" attempted migrations.

There is strong evidence as well that the Conference rejected the right to close land borders where to do so would trap refugees in the persecutors' territory.[6] Indeed, the majority agrees that the Convention *does* apply to refugees who have reached the border. *Ante*, at 181–182. The majority thus cannot maintain that Van Boetzelaer's interpretation prevailed.

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[6] In proceedings prior to that at which Van Boetzelaer made his remarks, the Ad Hoc Committee delegates from France, Belgium, and the United Kingdom had made clear that the principle of *non-refoulement*, which existed only in France and Belgium, *did* proscribe the rejection of refugees at a country's frontier. Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twenty-First Meeting, U. N. Doc. E/AC.32/SR.21, pp. 4–5 (1950). Consistent with the United States' historically strong support of nonreturn, the United States delegate to the Committee, Louis Henkin, confirmed this:

"Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.

"Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp." Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twentieth Meeting, U. N. Doc. E/AC.32/SR.20, ¶¶ 54 and 55, pp. 11–12 (1950).

Speaking next, the Israeli delegate to the Ad Hoc Committee concluded: "The Committee had already settled the humanitarian question of sending any refugee . . . back to a territory where his life or liberty might be in danger." *Id.*, ¶ 61, at 13.

That it did not is evidenced by the fact that Baron van Boetzelaer's interpretation was merely "placed on record," unlike formal amendments to the Convention which were "agreed to" or "adopted."[7] It should not be assumed that other delegates agreed with the comment simply because they did not object to their colleague's request to memorialize it, and the majority's statement that "this much cannot be denied: At one time there was a 'general consensus,'" *ante*, at 186, is wrong. All that can be said is that at one time Baron van Boetzelaer remarked that "he had gathered" that there was a general consensus, and that his interpretation was placed on record.

In any event, even if Van Boetzelaer's statement *had* been "agreed to" as reflecting the dominant view, this is not a case about the right of a nation to close its borders. This is a case in which a Nation has gone forth to *seize* aliens who are *not* at its borders and *return* them to persecution. Nothing in the comments relied on by the majority even hints at an intention on the part of the drafters to countenance a course of conduct so at odds with the Convention's basic purpose.[8]

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[7] See, *e. g.*, A/Conf.2/SR.35, at 22 ("adopt[ing] unanimously" the proposal to place the word "*refouler*" alongside the word "return"; *ibid.* ("adopt-[ing] unanimously" the suggestion that the words "membership of a particular social group" be inserted); *ibid.* ("agree[ing]" to changes in the actual wording of Article 33).

[8] The majority also cites secondary sources that, it claims, share its reading of the Convention. See *ante*, at 182–184, nn. 40 and 41. Not one of these authorities suggests that any signatory nation sought to reserve the right to seize refugees outside its territory and forcibly return them to their persecutors. Indeed, the first work cited explains that the entire reason for the drafting of Article 33 was "the consideration that the turning back of a refugee to the frontiers of a country where his life or freedom is threatened on account of race or similar grounds would be tantamount to delivering him into the hands of his persecutors." N. Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 161 (1953). These sources emphasize instead

In sum, the fragments of negotiating history upon which the majority relies are not entitled to deference, were never voted on or adopted, probably represent a minority view, and in any event do not address the issue in this case. It goes without saying, therefore, that they do not provide the "extraordinarily strong contrary evidence," *Sumitomo Shoji America, Inc.*, 457 U. S., at 185, required to overcome the Convention's plain statement: "No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . . ."

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that nations need not *admit* refugees or grant them *asylum*—questions not at issue here. See, *e. g.*, 2 A. Grahl-Madsen, The Status of Refugees in International Law 94 (1972) ("Article 33 only prohibits the expulsion or return *(refoulement)* of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting States to *admit* any person who has not already set foot on their respective territories") (emphasis added); G. Goodwin-Gill, The Refugee in International Law 87 (1983) ("[A] categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement*, even though it may result in serious consequences for *asylum*-seekers") (emphasis added); Aga Khan, Legal Problems Relating to Refugees and Displaced Persons, in Hague Academy of Int'l Law, 149 Recuil des Cours 287, 318 (1976) ("Does the *non-refoulement* rule thus laid down apply to refugees who present themselves at the frontier or only to those who are already within the territory of the Contracting State? . . . . It is intentional that the Convention fails to mention *asylum* as a right which the contracting States would undertake to grant to a refugee who, presenting himself at their frontiers, seeks the benefit of it. . . . There is thus a serious gap in refugee law as established by the 1951 Convention and other related instruments and it is high time that this gap should be filled") (emphasis added). The majority also cites incidental territorial references in the 1979 Handbook on Procedures and Criteria for Determining Refugee Status as "implici[t] acknowledg[ment]" that the United Nations High Commissioner for Refugees subscribes to their view that the Convention has no extraterritorial application. *Ante*, at 183, n. 40. The majority neglects to point out that the current High Commissioner for Refugees acknowledges that the Convention *does* apply extraterritorially. See Brief for United Nations High Commissioner for Refugees as *Amicus Curiae*.

II

A

Like the treaty whose dictates it embodies, § 243(h) of the Immigration and Nationality Act of 1952 (INA) is unambiguous. It reads:

> "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. § 1253(h)(1) (1988 ed., Supp. IV).

"With regard to this very statutory scheme, we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Cardoza-Fonseca*, 480 U. S., at 431 (internal quotation marks omitted). Ordinary, but not literal. The statement that "the Attorney General shall not deport or return any alien" obviously does not mean simply that the person who is the Attorney General at the moment is forbidden personally to deport or return any alien, but rather that her agents may not do so. In the present case the Coast Guard without question is acting as the agent of the Attorney General. "The officers of the Coast Guard insofar as they are engaged . . . in enforcing any law of the United States shall . . . be deemed to be acting as agents of the particular executive department . . . charged with the administration of the particular law . . . and . . . be subject to all the rules and regulations promulgated by such department . . . with respect to the enforcement of that law." 14 U. S. C. § 89(b). The Coast Guard is engaged in enforcing the immigration laws. The sole identified purpose of Executive Order No. 12807 is to address the "serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally." 57 Fed. Reg. 23133

(1992). The Coast Guard's task under the order is "to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens." *Ibid.* The Coast Guard is authorized to return a vessel and its passengers *only* "when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist." *Id.*, at 23134.

The majority suggests indirectly that the law which the Coast Guard enforces when it carries out the order to return a vessel reasonably believed to be violating the immigration laws is somehow not a law that the Attorney General is charged with administering. *Ante*, at 171–173. That suggestion is baseless. Under 8 U. S. C. § 1103(a), the Attorney General, with some exceptions, "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ." The majority acknowledges this designation, but speculates that the particular enforcement of immigration laws here may be covered by the exception for laws relating to "'the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . . .'" *Ante*, at 171.[9] The majority fails to point out the proviso

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[9] The Executive Order at issue cited as authority 8 U. S. C. § 1182(f), which allows the President to restrict or "for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants." The Haitians, of course, do not claim a right of entry.

Indeed, the very invocation of this section in this context is somewhat of a stretch. The section pertains to the President's power to interrupt for as long as necessary *legal* entries into the United States. Illegal entries cannot be "suspended"—they are already disallowed. Nevertheless, the Proclamation on which the Order relies declares, solemnly and hopefully: "The entry of undocumented aliens from the high seas is hereby

that directly follows the exception: "*Provided, however,* That . . . the Attorney General . . . . shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ." There can be no doubt that the Coast Guard is acting as the Attorney General's agent when it seizes and returns undocumented aliens.

Even the challenged Executive Order places the Attorney General "on the boat" with the Coast Guard.[10] The Order purports to give the Attorney General "unreviewable discretion" to decide that an alien will not be returned.[11] Discretion not to return an alien is of course discretion to return him. Such discretion cannot be given; Congress removed it in 1980 when it amended the INA to make mandatory ("*shall not* deport or *return*") what had been a discretionary function ("The Attorney General is authorized to withhold deportation"). The Attorney General may not decline to follow the command of § 243(h). If she encounters a refugee, she must not return him to persecution.

The laws that the Coast Guard is engaged in enforcing when it takes to the seas under orders to prevent aliens from illegally crossing our borders are laws whose administration has been assigned to the Attorney General by Congress, which has plenary power over immigration matters. *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972). Accordingly, there is no merit to the argument that the concomitant legal restrictions placed on the Attorney General by Congress do not apply with full force in this case.

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suspended . . . ." Presidential Proclamation No. 4865, 3 CFR 50, 51 (1981–1983 Comp.).

[10] Of course the Attorney General's authority is not dependent on its recognition in the Order.

[11] "[T]he Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."

B

Comparison with the pre-1980 version of § 243(h) confirms that the statute means what it says. Before 1980, § 243(h) provided:

> "The Attorney General is authorized to *withhold deportation* of any alien . . . *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason." 8 U. S. C. § 1253(h) (1976 ed., Supp. III) (emphasis added).

The Refugee Act of 1980 explicitly amended this provision in three critical respects. Congress (1) deleted the words "within the United States"; (2) barred the Government from "return[ing]," as well as "deport[ing]," alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions.

The import of these changes is clear. Whether "within the United States" or not, a refugee may not be returned to his persecutors. To read into § 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U. S., at 442–443 (citations omitted). Moreover, as all parties to this case acknowledge, the 1980 changes were made in order to conform our law to the United Nations Protocol. As has been shown above, that treaty's absolute ban on *refoulement* is similarly devoid of territorial restrictions.

The majority, however, downplays the significance of the deletion of "within the United States" to improvise a unique

meaning for "return."[12] It does so not by analyzing Article 33, the provision that inspired the 1980 amendments,[13] but by reference to a lone case from this Court that is not even mentioned in the legislative history and that had been on the books a full 22 years before the amendments' enactment.

In *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958), this Court decided that aliens paroled into the United States from detention at the border were not "within the United States" for purposes of the former § 243(h) and thus were not entitled to its benefits. Pointing to this decision, the majority offers the negative inference that Congress' removal of the words "within the United States" was meant only to extend a right of nonreturn to those in exclusion proceedings. But nothing in *Leng May Ma* even remotely suggests that the *only* persons not "within the United States" are those involved in exclusion proceedings. Indeed, such a suggestion would have been ridiculous. Nor does the narrow concept of exclusion relate in any obvious way to the amendment's broad phrase "return any alien."

The problems with the majority's *Leng May Ma* theory run deeper, however. When Congress in 1980 removed the

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[12] The word "return" is used throughout the INA; in no instance is there any indication that the word has a specialized meaning. See, *e. g.*, 8 U. S. C. §§ 1101(a)(27)(A) ("special immigrant" is one lawfully admitted "who is *returning* from a temporary visit abroad" (emphasis added)); 1101(a)(42)(A) ("refugee" is a person outside his own country who is "unable or unwilling to *return* to" his country because of persecution (emphasis added)); 1182(a)(7)(B)(i)(I) (nonimmigrant who does not possess passport authorizing him "to *return* to the country from which" he came is excludable (emphasis added)); 1252(a)(1) (deportable alien's parole may be revoked and the alien "*returned* to custody" (emphasis added)); 1353 (travel expenses will be paid for INS officers who "become eligible for voluntary retirement and *return* to the United States" (emphasis added)). It is axiomatic that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932).

[13] Indeed, reasoning backwards, the majority actually looks to the *American* scheme to illuminate the *treaty*. See *ante*, at 180–181.

phrase "within the United States," it did not substitute any other geographical limitation. This failure is exceedingly strange in light of the majority's hypothesis that the deletion was intended solely to work the particular technical adjustment of extending protection to those physically present in, yet not legally admitted to, the United States. It is even stranger given what Congress did elsewhere in the Act. The Refugee Act revised the immigration code to establish a comprehensive, tripartite system for the protection of refugees fleeing persecution.[14] Section 207 governs overseas refugee processing. Section 208, in turn, governs asylum claims by aliens "physically present in the United States, or at a land border or port of entry." Unlike these sections, however, which explicitly apply to persons present in specific locations, the amended § 243(h) includes no such limiting language. The basic prohibition against forced return to persecution applies simply to "any alien." The design of all three sections is instructive, and it undermines the majority's assertion that § 243(h) was meant to apply only to aliens physically present in the United States or at one of its borders. When Congress wanted a provision to apply only to aliens "physically present in the United States, or at a land border or port of entry," it said so. See § 208(a).[15] An examination

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[14] For this reason, the majority is mistaken to find any significance in the fact that the ban on return is located in the part of the INA that deals as well with the deportation and exclusion hearings in which requests for asylum or for withholding of deportation "are ordinarily advanced." *Ante*, at 173.

[15] Congress used the words "physically present within the United States" to delimit the reach not just of § 208 but of sections throughout the INA. See, *e. g.*, 8 U. S. C. §§ 1159 (adjustment of refugee status); 1101(a)(27)(I) (defining "special immigrant" for visa purposes); 1254(a)(1)–(2) (eligibility for suspension of deportation); 1255a(a)(3) (requirements for temporary resident status); 1401(d), (e), (g) (requirements for nationality but not citizenship at birth); 1409(c) (requirements for nationality status for children born out of wedlock); 1503(b) (requirement for appeal of denial of nationality status); and 1254a(c)(1)(A)(i), (c)(3)(B) (requirements for tem-

of the carefully designed provisions of the INA—not an elaborate theory about a 1958 case regarding the rights of aliens in exclusion proceedings—is the proper basis for an analysis of the statute.[16]

C

That the clarity of the text and the implausibility of its theories do not give the majority more pause is due, I think, to the majority's heavy reliance on the presumption against extraterritoriality. The presumption runs throughout the majority's opinion, and it stacks the deck by requiring the Haitians to produce "affirmative evidence" that when Congress prohibited the return of "any" alien, it indeed meant to prohibit the interception and return of aliens at sea.

The judicially created canon of statutory construction against extraterritorial application of United States law has no role here, however. It applies only where congressional intent is "unexpressed." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248–259 (1991); *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). Here there is no room for

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porary protected status). The majority offers no hypothesis for why Congress would not have done so here as well.

[16] Even if the majority's *Leng May Ma* proposition were correct, it would not support today's result. Leng May Ma was an excludable alien who had been in custody but was paroled into the United States. The Court determined that her parole did not change her legal status, and therefore that her case should be analyzed as if she were still "in custody." The Court then explained that "the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States," and stated: "It seems quite clear that an alien so confined would not be 'within the United States' for purposes of § 243(h)." 357 U. S., at 188. *Leng May Ma* stands for the proposition that aliens in custody who have not made legal entries—including, but not limited to, those who are granted the privilege of parole—are legally outside the United States. According to the majority, Congress deleted the territorial reference in order to extend protection to such aliens. By the majority's own reasoning, then, § 243(h) applies to unadmitted aliens held in United States custody. That, of course, is exactly the position in which the interdicted Haitians find themselves.

doubt: A territorial restriction has been deliberately deleted from the statute.

Even where congressional intent is unexpressed, however, a statute must be assessed according to its intended scope. The primary basis for the application of the presumption (besides the desire—not relevant here—to avoid conflict with the laws of other nations) is "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). Where that notion seems unjustified or unenlightening, however, generally worded laws covering varying subject matters are routinely applied extraterritorially. See, *e. g.*, *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U. S. 306 (1970) (extraterritorial application of the Jones Act); *Steele* v. *Bulova Watch Co.*, 344 U. S. 280 (1952) (Lanham Act applies extraterritorially); *Kawakita* v. *United States*, 343 U. S. 717 (1952) (extraterritorial application of treason statute); *Ford* v. *United States*, 273 U. S. 593, 602 (1927) (applying National Prohibition Act to high seas despite its silence on issue of extraterritoriality).

In this case we deal with a statute that regulates a distinctively international subject matter: immigration, nationalities, and refugees. Whatever force the presumption may have with regard to a primarily domestic statute evaporates in this context. There is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond this Nation's borders. The "commonsense notion" that Congress was looking inwards—perfectly valid in a case involving the Federal Tort Claims Act, such as *Smith*,—cannot be reasonably applied to the Refugee Act of 1980.

In this regard, the majority's dictum that the presumption has "special force" when we construe "statutory provisions that may involve foreign and military affairs for which the President has unique responsibility," *ante*, at 188, is completely wrong. The presumption that Congress did not in-

tend to legislate extraterritorially has *less* force—perhaps, indeed, no force at all—when a statute on its face relates to foreign affairs. What the majority appears to be getting at, as its citation to *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), suggests, *ante*, at 188, is that in some areas, the President, and not Congress, has sole constitutional authority. Immigration is decidedly not one of those areas. "'[O]ver no conceivable subject is the legislative power of Congress more complete . . . .'" *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977), quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909). And the suggestion that the President somehow is acting in his capacity as Commander in Chief is thwarted by the fact that nowhere among Executive Order No. 12807's numerous references to the immigration laws is that authority even once invoked.[17]

If any canon of construction should be applied in this case, it is the well-settled rule that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 117–118 (1804). The majority's improbable construction of § 243(h), which flies in the face of the international obligations imposed by Article 33 of the Convention, violates that established principle.

III

The Convention that the Refugee Act embodies was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily appli-

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[17] Indeed, petitioners are hard pressed to argue that restraints on the Coast Guard infringe upon the Commander in Chief's power when the President himself has placed that agency under the direct control of the Department of Transportation. See Declaration of Admiral Leahy, App. 233.

cable here, the Court's protestations of impotence and regret notwithstanding.

The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the treaty and the statute. We should not close our ears to it.

I dissent.

Syllabus

BROOKE GROUP LTD. *v.* BROWN & WILLIAMSON TOBACCO CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92–466. Argued March 29, 1993—Decided June 21, 1993

Cigarette manufacturing is a concentrated industry dominated by only six firms, including the two parties here. In 1980, petitioner (hereinafter Liggett) pioneered the economy segment of the market by developing a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. By 1984, generics had captured 4% of the market, at the expense of branded cigarettes, and respondent Brown & Williamson entered the economy segment, beating Liggett's net price. Liggett responded in kind, precipitating a price war, which ended, according to Liggett, with Brown & Williamson selling its generics at a loss. Liggett filed this suit, alleging, *inter alia*, that volume rebates by Brown & Williamson to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Liggett claimed that the rebates were integral to a predatory pricing scheme, in which Brown & Williamson set below-cost prices to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes. After a jury returned a verdict in favor of Liggett, the District Court held that Brown & Williamson was entitled to judgment as a matter of law. Among other things, it found a lack of injury to competition because there had been no slowing of the generics' growth rate and no tacit coordination of prices in the economy segment by the various manufacturers. In affirming, the Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting.

Held: Brown & Williamson is entitled to judgment as a matter of law. Pp. 219–243.

(a) The Robinson-Patman Act, by its terms, condemns price discrimination only to the extent that it threatens to injure competition. A claim of primary-line competitive injury under the Act, the type alleged here, is of the same general character as a predatory pricing claim under § 2 of the Sherman Act: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.

Utah Pie Co. v. *Continental Baking Co.*, 386 U. S. 685, distinguished. Accordingly, two prerequisites to recovery are also the same. A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below-cost prices. Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced. For recoupment to occur, the pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If so, then there is the further question whether the below-cost pricing would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The determination requires an estimate of the alleged predation's cost and a close analysis of both the scheme alleged and the relevant market's structure and conditions. Although not easy to establish, these prerequisites are essential components of real market injury. Pp. 219–227.

(b) An oligopoly's interdependent pricing may provide a means for achieving recoupment and thus may form the basis of a primary-line injury claim. Predatory pricing schemes, in general, are implausible, see *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 588–590, and are even more improbable when they require coordinated action among several firms, *id.*, at 590. They are least likely to occur where, as alleged here, the cooperation among firms is tacit, since effective tacit coordination is difficult to achieve; since there is a high likelihood that any attempt by one oligopolist to discipline a rival by cutting prices will produce an outbreak of competition; and since a predator's present losses fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. Nonetheless, the Robinson-Patman Act suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting, and this Court declines to create a *per se* rule of nonliability. In order for all of the Act's words to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting. Pp. 227–230.

Syllabus

(c) The record in this case demonstrates that the scheme Liggett alleged, when judged against the market's realities, does not provide an adequate basis for a finding of liability. While a reasonable jury could conclude that Brown & Williamson envisioned or intended an anticompetitive course of events and that the price of its generics was below its costs for 18 months, the evidence is inadequate to show that in pursuing this scheme, it had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson was likely to obtain the power to raise the prices for generic cigarettes above a competitive level, which is an indispensable aspect of Liggett's own proffered theory. The output and price information does not indicate that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment. Nor does the evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in that segment. Pp. 230–243.

964 F. 2d 335, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 243.

Phillip Areeda argued the cause for petitioner. With him on the briefs were *Charles Fried, Jean E. Sharpe, Josiah S. Murray III, James W. Dobbins, Garret G. Rasmussen,* and *C. Allen Foster.*

Robert H. Bork argued the cause for respondent. With him on the brief were *Griffin B. Bell, Frederick M. Rowe, Michael L. Robinson, Abbott B. Lipsky, Jr.,* and *Veronica G. Kayne.**

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*Briefs of *amici curiae* urging affirmance were filed for Atlantic Richfield Co. by *Ronald C. Redcay, Matthew T. Heartney, Otis Pratt Pearsall, Philip H. Curtis, Francis X. McCormack, Donald A. Bright,* and *Edward E. Clark;* and for ITT Corp. by *John H. Schafer* and *Edwin A. Kilburn.*

Briefs of *amici curiae* were filed for the Business Roundtable by *Thomas B. Leary;* and for the Grocery Manufacturers of America, Inc., by *Terry Calvani, W. Todd Miller,* and *C. Douglas Floyd.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case stems from a market struggle that erupted in the domestic cigarette industry in the mid-1980's. Petitioner Brooke Group Ltd., whom we, like the parties to the case, refer to as Liggett because of its former corporate name, charges that to counter its innovative development of generic cigarettes, respondent Brown & Williamson Tobacco Corporation introduced its own line of generic cigarettes in an unlawful effort to stifle price competition in the economy segment of the national cigarette market. Liggett contends that Brown & Williamson cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy segment. We hold that Brown & Williamson is entitled to judgment as a matter of law.

I

In 1980, Liggett pioneered the development of the economy segment of the national cigarette market by introducing a line of "black and white" generic cigarettes. The economy segment of the market, sometimes called the generic segment, is characterized by its bargain prices and comprises a variety of different products: black and whites, which are true generics sold in plain white packages with simple black lettering describing their contents; private label generics, which carry the trade dress of a specific purchaser, usually a retail chain; branded generics, which carry a brand name but which, like black and whites and private label generics, are sold at a deep discount and with little or no advertising; and "Value-25s," packages of 25 cigarettes that are sold to the consumer some 12.5% below the cost of a normal 20-cigarette pack. By 1984, when Brown & Williamson entered the generic segment and set in motion the series of events giving rise to this suit, Liggett's black and whites represented 97% of the generic segment, which in turn accounted for a little

more than 4% of domestic cigarette sales. Prior to Liggett's introduction of black and whites in 1980, sales of generic cigarettes amounted to less than 1% of the domestic cigarette market.

Because of the procedural posture of this case, we view the evidence in the light most favorable to Liggett. The parties are in basic agreement, however, regarding the central, historical facts. Cigarette manufacturing has long been one of America's most concentrated industries, see F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 250 (3d ed. 1990) (hereinafter Scherer & Ross); App. 495–498, and for decades, production has been dominated by six firms: R. J. Reynolds, Philip Morris, American Brands, Lorillard, and the two litigants involved here, Liggett and Brown & Williamson. R. J. Reynolds and Philip Morris, the two industry leaders, enjoyed respective market shares of about 28% and 40% at the time of trial. Brown & Williamson ran a distant third, its market share never exceeding 12% at any time relevant to this dispute. Liggett's share of the market was even less, from a low of just over 2% in 1980 to a high of just over 5% in 1984.

The cigarette industry also has long been one of America's most profitable, in part because for many years there was no significant price competition among the rival firms. See Scherer & Ross 250–251; R. Tennant, American Cigarette Industry 86–87 (1950); App. 128, 500–509, 531. List prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand. Substantial evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level, though not through unlawful conduct of the type that once characterized the industry. See Tennant, *supra*, at 275, 342; App. 389–392, 514–519, 658–659; cf. *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946); *United States*

v. *American Tobacco Co.*, 221 U. S. 106 (1911); Scherer & Ross 451.

By 1980, however, broad market trends were working against the industry. Overall demand for cigarettes in the United States was declining, and no immediate prospect of recovery existed. As industry volume shrank, all firms developed substantial excess capacity. This decline in demand, coupled with the effects of nonprice competition, had a severe negative impact on Liggett. Once a major force in the industry, with market shares in excess of 20%, Liggett's market share had declined by 1980 to a little over 2%. With this meager share of the market, Liggett was on the verge of going out of business.

At the urging of a distributor, Liggett took an unusual step to revive its prospects: It developed a line of black and white generic cigarettes. When introduced in 1980, black and whites were offered to consumers at a list price roughly 30% lower than the list price of full-priced, branded cigarettes. They were also promoted at the wholesale level by means of rebates that increased with the volume of cigarettes ordered. Black and white cigarettes thus represented a new marketing category. The category's principal competitive characteristic was low price. Liggett's black and whites were an immediate and considerable success, growing from a fraction of a percent of the market at their introduction to over 4% of the total cigarette market by early 1984.

As the market for Liggett's generic cigarettes expanded, the other cigarette companies found themselves unable to ignore the economy segment. In general, the growth of generics came at the expense of the other firms' profitable sales of branded cigarettes. Brown & Williamson was hardest hit, because many of Brown & Williamson's brands were favored by consumers who were sensitive to changes in cigarette prices. Although Brown & Williamson sold only 11.4% of the market's branded cigarettes, 20% of the converts to

Liggett's black and whites had switched from a Brown & Williamson brand. Losing volume and profits in its branded products, Brown & Williamson determined to enter the generic segment of the cigarette market. In July 1983, Brown & Williamson had begun selling Value-25s, and in the spring of 1984, it introduced its own black and white cigarette.

Brown & Williamson was neither the first nor the only cigarette company to recognize the threat posed by Liggett's black and whites and to respond in the economy segment. R. J. Reynolds had also introduced a Value-25 in 1983. And before Brown & Williamson introduced its own black and whites, R. J. Reynolds had repriced its "Doral" branded cigarette at generic levels. To compete with Liggett's black and whites, R. J. Reynolds dropped its list price on Doral about 30% and used volume rebates to wholesalers as an incentive to spur orders. Doral was the first competition at Liggett's price level.

Brown & Williamson's entry was an even graver threat to Liggett's dominance of the generic category. Unlike R. J. Reynolds' Doral, Brown & Williamson's product was also a black and white and so would be in direct competition with Liggett's product at the wholesale level and on the retail shelf. Because Liggett's and Brown & Williamson's black and whites were more or less fungible, wholesalers had little incentive to carry more than one line. And unlike R. J. Reynolds, Brown & Williamson not only matched Liggett's prices but beat them. At the retail level, the suggested list price of Brown & Williamson's black and whites was the same as Liggett's, but Brown & Williamson's volume discounts to wholesalers were larger. Brown & Williamson's rebate structure also encompassed a greater number of volume categories than Liggett's, with the highest categories carrying special rebates for orders of very substantial size. Brown & Williamson marketed its black and whites to Liggett's existing distributors as well as to its own full list of

buyers, which included a thousand wholesalers who had not yet carried any generic products.

Liggett responded to Brown & Williamson's introduction of black and whites in two ways. First, Liggett increased its own wholesale rebates. This precipitated a price war at the wholesale level, in which Liggett five times attempted to beat the rebates offered by Brown & Williamson. At the end of each round, Brown & Williamson maintained a real advantage over Liggett's prices. Although it is undisputed that Brown & Williamson's original net price for its black and whites was above its costs, Liggett contends that by the end of the rebate war, Brown & Williamson was selling its black and whites at a loss. This rebate war occurred before Brown & Williamson had sold a single black and white cigarette.

Liggett's second response was to file a lawsuit. Two weeks after Brown & Williamson announced its entry into the generic segment, again before Brown & Williamson had sold any generic cigarettes, Liggett filed a complaint in the United States District Court for the Middle District of North Carolina alleging trademark infringement and unfair competition. Liggett later amended its complaint to add an antitrust claim under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(a), which alleged illegal price discrimination between Brown & Williamson's full-priced branded cigarettes and its low-priced generics. See *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.*, 1989–1 Trade Cas. (CCH) ¶ 68,583, p. 61,099 (MDNC 1988). These claims were either dismissed on summary judgment, see *ibid.*, or rejected by the jury. They were not appealed.

Liggett also amended its complaint to add a second Robinson-Patman Act claim, which is the subject of the present controversy. Liggett alleged that Brown & Williamson's volume rebates to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition,

in violation of § 2(a). Liggett claimed that Brown & Williamson's discriminatory volume rebates were integral to a scheme of predatory pricing, in which Brown & Williamson reduced its net prices for generic cigarettes below average variable costs. According to Liggett, these below-cost prices were not promotional but were intended to pressure it to raise its list prices on generic cigarettes, so that the percentage price difference between generic and branded cigarettes would narrow. Liggett explained that it would have been unable to reduce its wholesale rebates without losing substantial market share to Brown & Williamson; its only choice, if it wished to avoid prolonged losses on its principal product line, was to raise retail prices. The resulting reduction in the list price gap, it was said, would restrain the growth of the economy segment and preserve Brown & Williamson's supracompetitive profits on its branded cigarettes.

The trial began in the fall of 1989. By that time, all six cigarette companies had entered the economy segment. The economy segment was the fastest growing segment of the cigarette market, having increased from about 4% of the market in 1984, when the rebate war in generics began, to about 15% in 1989. Black and white generics had declined as a force in the economy segment as consumer interest shifted toward branded generics, but Liggett's overall volume had increased steadily to 9 billion generic cigarettes sold. Overall, the 2.8 billion generic cigarettes sold in 1981 had become 80 billion by 1989.

The consumer price of generics had increased along with output. For a year, the list prices for generic cigarettes established at the end of the rebate war remained stable. But in June 1985, Liggett raised its list price, and the other firms followed several months later. The precise effect of the list price increase is difficult to assess, because all of the cigarette firms offered a variety of discounts, coupons, and other promotions directly to consumers on both generic and

branded cigarettes. Nonetheless, at least some portion of the list price increase was reflected in a higher net price to the consumer.

In December 1985, Brown & Williamson attempted to increase its list prices, but retracted the announced increase when the other firms adhered to their existing prices. Thus, after Liggett's June 1985 increase, list prices on generics did not change again until the summer of 1986, when a pattern of twice yearly increases in tandem with the full-priced branded cigarettes was established. The dollar amount of these increases was the same for generic and full-priced cigarettes, which resulted in a greater percentage price increase in the less expensive generic cigarettes and a narrowing of the percentage gap between the list price of branded and black and white cigarettes, from approximately 38% at the time Brown & Williamson entered the segment to approximately 27% at the time of trial. Also by the time of trial, five of the six manufacturers, including Liggett, had introduced so-called "subgenerics," a category of branded generic cigarettes that sold at a discount of 50% or more off the list price of full-priced branded cigarettes.

After a 115-day trial involving almost 3,000 exhibits and over a score of witnesses, the jury returned a verdict in favor of Liggett, finding on the special verdict form that Brown & Williamson had engaged in price discrimination that had a reasonable possibility of injuring competition in the domestic cigarette market as a whole. The jury awarded Liggett $49.6 million in damages, which the District Court trebled to $148.8 million. After reviewing the record, however, the District Court held that Brown & Williamson was entitled to judgment as a matter of law on three separate grounds: lack of injury to competition, lack of antitrust injury to Liggett, and lack of a causal link between the discriminatory rebates and Liggett's alleged injury. *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.*, 748 F. Supp. 344 (MDNC 1990). With respect to the first issue, which is the

only one before us, the District Court found that no slowing of the growth rate of generics, and thus no injury to competition, was possible unless there had been tacit coordination of prices in the economy segment of the cigarette market by the various manufacturers. *Id.*, at 354–355. The District Court held that a reasonable jury could come to but one conclusion about the existence of such coordination among the firms contending for shares of the economy segment: it did not exist, and Brown & Williamson therefore had no reasonable possibility of limiting the growth of the segment. *Id.*, at 356–358.

The United States Court of Appeals for the Fourth Circuit affirmed. *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.*, 964 F. 2d 335 (1992). The Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting, which necessarily involves a price cut by one of the oligopolists. *Id.*, at 342. In the Court of Appeals' view, "[t]o rely on the characteristics of an oligopoly to assure recoupment of losses from a predatory pricing scheme after one oligopolist has made a competitive move is . . . economically irrational." *Ibid.*

We granted certiorari, 506 U. S. 984 (1992), and now affirm.

II

A

Price discrimination is made unlawful by § 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, which provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent

> competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U. S. C. § 13(a).

Although we have reiterated that "'a price discrimination within the meaning of [this] provision is merely a price difference,'" *Texaco Inc.* v. *Hasbrouck*, 496 U. S. 543, 558 (1990) (quoting *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549 (1960)), the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead, the statute contains a number of important limitations, one of which is central to evaluating Liggett's claim: By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, § 13(a), "changing conditions affecting the market for or the marketability of the goods concerned," *ibid.*, or conduct undertaken "in good faith to meet an equally low price of a competitor," § 13(b); *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 250 (1951), confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U. S. 69, 80, n. 13 (1979). See also *Automatic Canteen Co. of America* v. *FTC*, 346 U. S. 61, 63, 74 (1953).

Liggett contends that Brown & Williamson's discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market. This type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury. See *FTC* v. *Anheuser-Busch, Inc.*, *supra*, at 538. We last addressed primary-line injury over 25 years ago, in *Utah Pie Co.* v. *Continental Baking Co.*,

386 U. S. 685 (1967). In *Utah Pie*, we reviewed the sufficiency of the evidence supporting jury verdicts against three national pie companies that had engaged in a variety of predatory practices in the market for frozen pies in Salt Lake City, with the intent to drive a local pie manufacturer out of business. We reversed the Court of Appeals and held that the evidence presented was adequate to permit a jury to find a likelihood of injury to competition. *Id.*, at 703.

Utah Pie has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure. The case has been criticized on the ground that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition. See Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L. J. 70 (1967); R. Posner, Antitrust Law: An Economic Perspective 193–194 (1976); L. Sullivan, Antitrust 687 (1977); 3 P. Areeda & D. Turner, Antitrust Law ¶ 720c (1978) (hereinafter Areeda & Turner); R. Bork, The Antitrust Paradox 386–387 (1978); H. Hovenkamp, Economics and Federal Antitrust Law 188–189 (1985). We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act. As the law has been explored since *Utah Pie*, it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act. See, *e. g.*, *Henry* v. *Chloride, Inc.*, 809 F. 2d 1334, 1345 (CA8 1987); *D. E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F. 2d 1431, 1439 (CA6 1983), cert. denied, 467 U. S. 1242 (1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1041 (CA9 1981), cert. denied, 459 U. S. 825 (1982);

Malcolm v. *Marathon Oil Co.*, 642 F. 2d 845, 853, n. 16 (CA5), cert. denied, 454 U. S. 1125 (1981); *Pacific Engineering & Production Co. of Nevada* v. *Kerr-McGee Corp.*, 551 F. 2d 790, 798 (CA10), cert. denied, 434 U. S. 879 (1977); *International Telephone & Telegraph Corp.*, 104 F. T. C. 280, 401–402 (1984); Hovenkamp, *supra*, at 189; 3 Areeda & Turner ¶ 720c; P. Areeda & H. Hovenkamp, Antitrust Law ¶ 720c (Supp. 1992) (hereinafter Areeda & Hovenkamp). There are, to be sure, differences between the two statutes. For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses "a dangerous probability of actual monopolization," *Spectrum Sports, Inc.* v. *McQuillan*, 506 U. S. 447, 455 (1993), whereas the Robinson-Patman Act requires only that there be "a reasonable possibility" of substantial injury to competition before its protections are triggered, *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 434 (1983). But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.

Accordingly, whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.[1] See, *e. g.*, *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104, 117 (1986); *Mat-*

[1] Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost. See *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104, 117–118, n. 12 (1986); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 585, n. 8 (1986).

sushita Elec. Industrial Co. v. *Zenith Radio Corp.*, 475 U. S. 574, 585, n. 8 (1986); *Utah Pie*, 386 U. S., at 698, 701, 702–703, n. 14; *In re E. I. DuPont de Nemours & Co.*, 96 F. T. C. 653, 749 (1980). Cf. *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963) (holding that below-cost prices may constitute "unreasonably low" prices for purposes of §3 of the Robinson-Patman Act, 15 U. S. C. §13a). Although *Cargill* and *Matsushita* reserved as a formal matter the question "'whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost,'" *Cargill*, *supra*, at 117–118, n. 12 (quoting *Matsushita*, *supra*, at 585, n. 9), the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. See *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 340 (1990). "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved." *Ibid.* As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting. See Areeda & Hovenkamp ¶¶ 714.2, 714.3. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." *Cargill*, *supra*, at 116.

Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be

illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy. Cf. Areeda & Hovenkamp ¶¶ 714.2d, 714.2f; Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 708–709 (1975); Posner, Antitrust Law: An Economic Perspective, at 195, n. 39.

The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. See *Matsushita*, *supra*, at 589; *Cargill*, *supra*, at 119, n. 15. "For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Matsushita*, *supra*, at 588–589. Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for "the protection of *competition*, not *competitors*." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962). Earlier this Term, we held in the Sherman Act §2 context

that it was not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics"; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." *Spectrum Sports*, 506 U. S., at 459. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch*, 325 U. S. 821, 826 (1945).

For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. See 3 Areeda & Turner ¶ 711b. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess

profits what they earlier gave up in below-cost prices." *Matsushita*, 475 U. S., at 590–591.

Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. Cf., *e. g.*, Elzinga & Mills, Testing for Predation: Is Recoupment Feasible?, 34 Antitrust Bull. 869 (1989) (constructing one possible model for evaluating recoupment). If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate. See, *e. g.*, *Cargill*, 479 U. S., at 119–120, n. 15.

These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita*, *supra*, at 589, and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Cargill*, *supra*, at 122, n. 17 (quoting *Matsushita*, *supra*, at 594). It would be ironic indeed if the standards for predatory pricing liability

were so low that antitrust suits themselves became a tool for keeping prices high.

B

Liggett does not allege that Brown & Williamson sought to drive it from the market but that Brown & Williamson sought to preserve supracompetitive profits on branded cigarettes by pressuring Liggett to raise its generic cigarette prices through a process of tacit collusion with the other cigarette companies. Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. See 2 Areeda & Turner ¶ 404; Scherer & Ross 199–208.

In *Matsushita*, we remarked upon the general implausibility of predatory pricing. See 475 U. S., at 588–590. *Matsushita* observed that such schemes are even more improbable when they require coordinated action among several firms. *Id.*, at 590. *Matsushita* involved an allegation of an express conspiracy to engage in predatory pricing. The Court noted that in addition to the usual difficulties that face a single firm attempting to recoup predatory losses, other problems render a conspiracy "incalculably more difficult to execute." *Ibid.* In order to succeed, the conspirators must agree on how to allocate present losses and future gains among the firms involved, and each firm must resist powerful incentives to cheat on whatever agreement is reached. *Ibid.*

However unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination. Firms that seek to recoup predatory losses through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth

cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

From one standpoint, recoupment through oligopolistic price coordination could be thought more feasible than recoupment through monopoly: In the oligopoly setting, the victim itself has an economic incentive to acquiesce in the scheme. If forced to choose between cutting prices and sustaining losses, maintaining prices and losing market share, or raising prices and enjoying a share of supracompetitive profits, a firm may yield to the last alternative. Yet on the whole, tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses. In addition to the difficulty of achieving effective tacit coordination and the high likelihood that any attempt to discipline will produce an outbreak of competition, the predator's present losses in a case like this fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. In this case, for example, Brown & Williamson, with its 11–12% share of the cigarette market, would have had to generate around $9 in supracompetitive profits for each $1 invested in predation; the remaining $8 would belong to its competitors, who had taken no risk.

Liggett suggests that these considerations led the Court of Appeals to rule out its theory of recovery as a matter of law. Although the proper interpretation of the Court of Appeals' opinion is not free from doubt, there is some indication that it held as a matter of law that the Robinson-Patman Act does not reach a primary-line injury claim in which tacit coordination among oligopolists provides the alleged basis for recoupment. The Court of Appeals' opinion does not contain the traditional apparatus of fact review; rather, it focuses on theoretical and legal arguments. The final paragraph appears to state the holding: Brown & Williamson

may not be held liable because oligopoly pricing does not "'provide an economically rational basis'" for recouping predatory losses. 964 F. 2d, at 342.

To the extent that the Court of Appeals may have held that the interdependent pricing of an oligopoly may never provide a means for achieving recoupment and so may not form the basis of a primary-line injury claim, we disagree. A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability. See *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 466–467 (1992).

The Robinson-Patman Act, which amended § 2 of the original Clayton Act, suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting. Unlike the provisions of the Sherman Act, which speak only of various forms of express agreement and monopoly, see 15 U. S. C. §§ 1, 2, the Robinson-Patman Act is phrased in broader, disjunctive terms, prohibiting price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly," 15 U. S. C. § 13(a). For all the words of the Act to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise"). The language referring to a substantial lessening of competition was part of the original Clayton Act § 2, see Act of Oct. 15, 1914, ch. 322, 38 Stat. 730, and the same phrasing appears in § 7 of that Act. In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordina-

tion it portends, may be the injury to competition the Act prohibits. See, *e. g., United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321 (1963). We adhere to "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990) (internal quotation marks omitted). See also *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 562 (1981) (evaluating the competitive injury requirement of Robinson-Patman Act § 2(a) in light of analogous interpretations of Clayton Act § 7). We decline to create a *per se* rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing. Cf. *Cargill*, 479 U. S., at 121.

III

Although Liggett's theory of liability, as an abstract matter, is within the reach of the statute, we agree with the Court of Appeals and the District Court that Liggett was not entitled to submit its case to the jury. It is not customary for this Court to review the sufficiency of the evidence, but we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources. See, *e. g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. 585, 605–611 (1985); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 765–768 (1984); *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 550–552 (1966). The record in this case demonstrates that the anticompetitive scheme Liggett alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability.

A

Liggett's theory of competitive injury through oligopolistic price coordination depends upon a complex chain of cause

and effect: Brown & Williamson would enter the generic segment with list prices matching Liggett's but with massive, discriminatory volume rebates directed at Liggett's biggest wholesalers; as a result, the net price of Brown & Williamson's generics would be below its costs; Liggett would suffer losses trying to defend its market share and wholesale customer base by matching Brown & Williamson's rebates; to avoid further losses, Liggett would raise its list prices on generics or acquiesce in price leadership by Brown & Williamson; higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes; and this narrowing of the gap would make generics less appealing to the consumer, thus slowing the growth of the economy segment and reducing cannibalization of branded sales and their associated supracompetitive profits.

Although Brown & Williamson's entry into the generic segment could be regarded as procompetitive in intent as well as effect, the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events. See, *e. g.*, App. 57–58, 67–68, 89–91, 99, 112–114, 200, 241, 253, 257, 262–263, 279–280, 469–470, 664–666. There is also sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs, see *id.*, at 338–339, 651, 740, and that this below-cost pricing imposed losses on Liggett that Liggett was unwilling to sustain, given its corporate parent's effort to locate a buyer for the company, see *id.*, at 74, 92, 200, 253, 596–597. Liggett has failed to demonstrate competitive injury as a matter of law, however, because its proof is flawed in a critical respect: The evidence is inadequate to show that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. As we have noted, "[t]he success of any predatory

scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U. S., at 589 (emphasis omitted).

No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson—whatever its intent in introducing black and whites may have been—was likely to obtain the power to raise the prices for generic cigarettes above a competitive level. Recoupment through supracompetitive pricing in the economy segment of the cigarette market is an indispensable aspect of Liggett's own proffered theory, because a slowing of growth in the economy segment, even if it results from an increase in generic prices, is not itself anticompetitive. Only if those higher prices are a product of nonmarket forces has competition suffered. If prices rise in response to an excess of demand over supply, or segment growth slows as patterns of consumer preference become stable, the market is functioning in a competitive manner. Consumers are not injured from the perspective of the antitrust laws by the price increases; they are in fact causing them. Thus, the linchpin of the predatory scheme alleged by Liggett is Brown & Williamson's ability, with the other oligopolists, to raise prices above a competitive level in the generic segment of the market. Because relying on tacit coordination among oligopolists as a means of recouping losses from predatory pricing is "highly speculative," Areeda & Hovenkamp ¶ 711.2c, at 647, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition. The evidence in this case is insufficient to demonstrate the danger of Brown & Williamson's alleged scheme.

B

Based on Liggett's theory of the case and the record it created, there are two means by which one might infer that

Brown & Williamson had a reasonable prospect of producing sustained supracompetitive pricing in the generic segment adequate to recoup its predatory losses: first, if generic output or price information indicates that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment; or second, if evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic segment, even if it did not actually do so.

1

In this case, the price and output data do not support a reasonable inference that Brown & Williamson and the other cigarette companies elevated prices above a competitive level for generic cigarettes. Supracompetitive pricing entails a restriction in output. See *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104–108 (1984); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 19–20 (1979); P. Samuelson & W. Nordhaus, Economics 516 (12th ed. 1985); Sullivan, Antitrust, at 32; Bork, The Antitrust Paradox, at 178–179; 2 Areeda & Turner ¶ 403a; Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 20, 31 (1984). In the present setting, in which output expanded at a rapid rate following Brown & Williamson's alleged predation, output in the generic segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent Brown & Williamson's intervention. Such a counterfactual proposition is difficult to prove in the best of circumstances; here, the record evidence does not permit a reasonable inference that output would have been greater without Brown & Williamson's entry into the generic segment.

Following Brown & Williamson's entry, the rate at which generic cigarettes were capturing market share did not slow; indeed, the average rate of growth doubled. During the

four years from 1980 to 1984 in which Liggett was alone in the generic segment, the segment gained market share at an average rate of 1% of the overall market per year, from 0.4% in 1980 to slightly more than 4% of the cigarette market in 1984. In the next five years, following the alleged predation, the generic segment expanded from 4% to more than 15% of the domestic cigarette market, or greater than 2% per year.

While this evidence tends to show that Brown & Williamson's participation in the economy segment did not restrict output, it is not dispositive. One could speculate, for example, that the rate of segment growth would have tripled, instead of doubled, without Brown & Williamson's alleged predation. But there is no concrete evidence of this. Indeed, the only industry projection in the record estimating what the segment's growth would have been without Brown & Williamson's entry supports the opposite inference. In 1984, Brown & Williamson forecast in an important planning document that the economy segment would account for 10% of the total cigarette market by 1988 if it did not enter the segment. App. 133, 135. In fact, in 1988, after what Liggett alleges was a sustained and dangerous anticompetitive campaign by Brown & Williamson, the generic segment accounted for over 12% of the total market. *Id.*, at 354–356. Thus the segment's output expanded more robustly than Brown & Williamson had estimated it would had Brown & Williamson never entered.

Brown & Williamson did note in 1985, a year after introducing its black and whites, that its presence within the generic segment "appears to have resulted in . . . a slowing in the segment's growth rate." *Id.*, at 257. But this statement was made in early 1985, when Liggett itself contends the below-cost pricing was still in effect and before any anticompetitive contraction in output is alleged to have occurred.

Whatever it may mean,[2] this statement has little value in evaluating the competitive implications of Brown & Williamson's later conduct, which was alleged to provide the basis for recouping predatory losses.

In arguing that Brown & Williamson was able to exert market power and raise generic prices above a competitive level in the generic category through tacit price coordination with the other cigarette manufacturers, Liggett places its principal reliance on direct evidence of price behavior. This evidence demonstrates that the list prices on all cigarettes, generic and branded alike, rose to a significant degree during the late 1980's. *Id.*, at 325. From 1986 to 1989, list prices on both generic and branded cigarettes increased twice a year by similar amounts. Liggett's economic expert testified that these price increases outpaced increases in costs, taxes, and promotional expenditures. *Id.*, at 525. The list prices of generics, moreover, rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between branded and generic products. *Id.*, at 325. Liggett argues that this would permit a reasonable jury to find that Brown & Williamson succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic category sufficient to slow its growth, thereby preserving supracompetitive branded profits and recouping its predatory losses.

A reasonable jury, however, could not have drawn the inferences Liggett proposes. All of Liggett's data are based upon the list prices of various categories of cigarettes. Yet the jury had before it undisputed evidence that during the period in question, list prices were not the actual prices paid by consumers. 100 Tr. 227–229. As the market became un-

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[2] This statement could well have referred to the rate at which the segment was growing relative to prior years' generic volume; this "internal" rate of growth would inevitably slow as the base volume against which it was measured grew.

settled in the mid-1980's, the cigarette companies invested substantial sums in promotional schemes, including coupons, stickers, and giveaways, that reduced the actual cost of cigarettes to consumers below list prices. 33 Tr. 206–209, 51 Tr. 130. This promotional activity accelerated as the decade progressed. App. 509, 672. Many wholesalers also passed portions of their volume rebates on to the consumer, which had the effect of further undermining the significance of the retail list prices. *Id.*, at 672, 687–692, 761–763. Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices.

Even on its own terms, the list price data relied upon by Liggett to demonstrate a narrowing of the price differential between generic and full-priced branded cigarettes could not support the conclusion that supracompetitive pricing had been introduced into the generic segment. Liggett's gap data ignore the effect of "subgeneric" cigarettes, which were priced at discounts of 50% or more from the list prices of normal branded cigarettes. See, *e. g.*, *id.*, at 682–686. Liggett itself, while supposedly under the sway of oligopoly power, pioneered this development in 1988 with the introduction of its "Pyramid" brand. *Id.*, at 326. By the time of trial, five of the six major manufacturers offered a cigarette in this category at a discount from the full list price of at least 50%. *Id.*, at 685–686; 147 Tr. 107. Thus, the price difference between the highest priced branded cigarette and the lowest price cigarettes in the economy segment, instead of narrowing over the course of the period of alleged predation as Liggett would argue, grew to a substantial extent. In June 1984, before Brown & Williamson entered the generic segment, a consumer could obtain a carton of black and white generic cigarettes from Liggett at a 38% discount from the list price of a leading brand; after the conduct Liggett

complains of, consumers could obtain a branded generic from Liggett for 52% off the list price of a leading brand. See App. 325–326, 685.

It may be that a reasonable jury could conclude that the cumulative discounts attributable to subgenerics and the various consumer promotions did not cancel out the full effect of the increases in list prices, see *id.*, at 508–509, and that actual prices to the consumer did indeed rise, but rising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Cf. *Monsanto*, 465 U. S., at 763.

Quite apart from the absence of any evidence of that sort, an inference of supracompetitive pricing would be particularly anomalous in this case, as the very party alleged to have been coerced into pricing through oligopolistic coordination denied that such coordination existed: Liggett's own officers and directors consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits. App. 394–399, 623–631; 11 Tr. 170–174, 64 Tr. 51–56. Liggett seeks to explain away this testimony by arguing that its officers and directors are businesspeople who do not ascribe the same meaning to words like "competitive" and "collusion" that an economist would. This explanation is entitled to little, if any, weight. As the District Court found:

> "This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed

the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B[rown] & W[illiamson] lawyers and did not mean to contradict the testimony of [their economic expert] Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory." 748 F. Supp., at 356.

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Not only does the evidence fail to show actual supracompetitive pricing in the generic segment, it also does not demonstrate its likelihood. At the time Brown & Williamson entered the generic segment, the cigarette industry as a whole faced declining demand and possessed substantial excess capacity. App. 82–84. These circumstances tend to break down patterns of oligopoly pricing and produce price competition. See Scherer & Ross 294, 315; 2 Areeda & Turner ¶ 404b2, at 275–276; 6 P. Areeda, Antitrust Law ¶ 1430e, p. 181 (1986). The only means by which Brown & Williamson is alleged to have established oligopoly pricing in the face of these unusual competitive pressures is through tacit price coordination with the other cigarette firms.

Yet the situation facing the cigarette companies in the 1980's would have made such tacit coordination unmanageable. Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus. See generally Scherer & Ross 215–315; 6 P. Areeda, *supra*, ¶¶ 1428–1430. Uncertainty is an oligopoly's greatest enemy. By 1984, however, the cigarette market was in an obvious state of flux. The introduction of generic cigarettes in 1980 represented the first serious price com-

petition in the cigarette market since the 1930's. See Scherer & Ross 250–251; App. 128. This development was bound to unsettle previous expectations and patterns of market conduct and to reduce the cigarette firms' ability to predict each other's behavior.

The larger number of product types and pricing variables also decreased the probability of effective parallel pricing. When Brown & Williamson entered the economy segment in 1984, the segment included Value-25s, black and whites, and branded generics. With respect to each product, the net price in the market was determined not only by list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers. In order to coordinate in an effective manner and eliminate price competition, the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor. Liggett has not even alleged parallel behavior with respect to these other variables, and the inherent limitations of tacit collusion suggest that such multivariable coordination is improbable. See R. Dorfman, The Price System 99–100, and n. 10 (1964); Scherer & Ross 279.

In addition, R. J. Reynolds had incentives that, in some respects, ran counter to those of the other cigarette companies. It is implausible that without a shared interest in retarding the growth of the economy segment, Brown & Williamson and its fellow oligopolists could have engaged in parallel pricing and raised generic prices above a competitive level. "[C]oordination will not be possible when any significant firm chooses, for any reason, to 'go it alone.'" 2 Areeda & Turner ¶ 404b2, at 276. It is undisputed—indeed it was conceded by Liggett's expert—that R. J. Reynolds acted without regard to the supposed benefits of oligopolistic coordination when it repriced Doral at generic levels in the spring of 1984 and that the natural and probable consequence

of its entry into the generic segment was procompetitive. 55 Tr. 15–16; 51 Tr. 128. Indeed, Reynolds' apparent objective in entering the segment was to capture a significant amount of volume in order to regain its number one sales position in the cigarette industry from Philip Morris. App. 75, 130, 209–211. There is no evidence that R. J. Reynolds accomplished this goal during the period relevant to this case, or that its commitment to achieving that goal changed. Indeed, R. J. Reynolds refused to follow Brown & Williamson's attempt to raise generic prices in June 1985. The jury thus had before it undisputed evidence that contradicts the suggestion that the major cigarette companies shared a goal of limiting the growth of the economy segment; one of the industry's two major players concededly entered the segment to expand volume and compete.

Even if all the cigarette companies were willing to participate in a scheme to restrain the growth of the generic segment, they would not have been able to coordinate their actions and raise prices above a competitive level unless they understood that Brown & Williamson's entry into the segment was not a genuine effort to compete with Liggett. If even one other firm misinterpreted Brown & Williamson's entry as an effort to expand share, a chain reaction of competitive responses would almost certainly have resulted, and oligopoly discipline would have broken down, perhaps irretrievably. "[O]nce the trust among rivals breaks down, it is as hard to put back together again as was Humpty-Dumpty, and non-collusive behavior is likely to take over." Samuelson & Nordhaus, Economics, at 534.

Liggett argues that the means by which Brown & Williamson signaled its anticompetitive intent to its rivals was through its pricing structure. According to Liggett, maintaining existing list prices while offering substantial rebates to wholesalers was a signal to the other cigarette firms that Brown & Williamson did not intend to attract additional smokers to the generic segment by its entry. But a reason-

able jury could not conclude that this pricing structure eliminated or rendered insignificant the risk that the other firms might misunderstand Brown & Williamson's entry as a competitive move. The likelihood that Brown & Williamson's rivals would have regarded its pricing structure as an important signal is low, given that Liggett itself, the purported target of the predation, was already using similar rebates, as was R. J. Reynolds in marketing its Doral branded generic. A Reynolds executive responsible for Doral testified that given its and Liggett's use of wholesaler rebates, Brown & Williamson could not have competed effectively without them. App. 756. And despite extensive discovery of the corporate records of R. J. Reynolds and Philip Morris, no documents appeared that indicated any awareness of Brown & Williamson's supposed signal by its principal rivals. Without effective signaling, it is difficult to see how the alleged predation could have had a reasonable chance of success through oligopoly pricing.

Finally, although some of Brown & Williamson's corporate planning documents speak of a desire to slow the growth of the segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means. It is undisputed that when Brown & Williamson introduced its generic cigarettes, it offered them to a thousand wholesalers who had never before purchased generic cigarettes. Record, Plaintiff's Exh. No. 4079; 87 Tr. 191; 88 Tr. 143–147. The inevitable effect of this marketing effort was to expand the segment, as the new wholesalers recruited retail outlets to carry generic cigarettes. Even with respect to wholesalers already carrying generics, Brown & Williamson's unprecedented volume rebates had a similar expansionary effect. Unlike many branded cigarettes, generics came with no sales guarantee to the wholesaler; any unsold stock represented pure loss to the wholesaler. By providing substantial incentives for wholesalers to place large orders, Brown & Williamson cre-

ated strong pressure for them to sell more generic cigarettes. In addition, as we have already observed, see *supra*, at 236, many wholesalers passed portions of the rebates about which Liggett complains on to consumers, thus dropping the retail price of generics and further stimulating demand. Brown & Williamson provided a further, direct stimulus, through some $10 million it spent during the period of alleged predation placing discount stickers on its generic cartons to reduce prices to the ultimate consumer. 70 Tr. 246. In light of these uncontested facts about Brown & Williamson's conduct, it is not reasonable to conclude that Brown & Williamson threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market.

To be sure, Liggett's economic expert explained Liggett's theory of predatory price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole. App. 600–614. But this does not alter our analysis. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Cf. *J. Truett Payne Co., Inc.*, 451 U. S., at 564–565 (referring to expert economic testimony not based on "documentary evidence as to the effect of the discrimination on retail prices" as "weak" at best). Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita*, "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion. 475 U. S., at 594, n. 19. Here, Liggett's expert based his opinion that Brown & Williamson had a reasonable prospect of recouping its predatory losses on three factors: Brown & Williamson's black and white pricing structure, cor-

porate documents showing an intent to shrink the price differential between generic and branded cigarettes, and evidence of below-cost pricing. App. 601–602. Because, as we have explained, this evidence is insufficient as a matter of law to support a finding of primary-line injury under the Robinson-Patman Act, the expert testimony cannot sustain the jury's verdict.

IV

We understand that the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a matter of law is demanding. But a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market. We hold that the evidence cannot support a finding that Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit. The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

For a period of 18 months in 1984 and 1985, respondent Brown & Williamson Tobacco Corporation (B&W) waged a price war against petitioner, known then as Liggett & Myers (Liggett). Liggett filed suit claiming that B&W's pricing practices violated the Robinson-Patman Act.[1] After a 115-

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants

day trial, the jury agreed, and awarded Liggett substantial damages. The Court of Appeals, however, found that Liggett could not succeed on its claim, because B&W, as an independent actor controlling only 12% of the national cigarette market, could not injure competition. *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.*, 964 F. 2d 335, 340–342 (CA4 1992).

Today, the Court properly rejects that holding. See *ante*, at 229–230. Instead of remanding the case to the Court of Appeals to resolve the other issues raised by the parties, however, the Court goes on to review portions of the voluminous trial record, and comes to the conclusion that the evidence does not support the jury's finding that B&W's price discrimination "had a reasonable possibility of injuring competition."[2] In my opinion the evidence is plainly sufficient to support that finding.

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or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U. S. C. § 13(a).

[2] The jury gave an affirmative answer to the following special issue:

"1. Did Brown & Williamson engage in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States?" App. 27.

The jury made its finding after being instructed that "injury to competition" means "the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined submarket above competitive levels. In order to injure competition in the cigarette market as a whole, Brown & Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels.

"You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors and, therefore, injury to competition does not mean injury to a competitor. Liggett & Myers can not satisfy this element simply by showing that they were injured by Brown & Williamson's conduct. To satisfy this element, Liggett & Myers must show, by a preponderance of the evidence, that Brown & Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market and not just a reasonable possibility of injuring a competitor in the cigarette market." *Id.*, at 829–830.

I

The fact that a price war may not have accomplished its purpose as quickly or as completely as originally intended does not immunize conduct that was illegal when it occurred. A proper understanding of this case therefore requires a brief description of the situation before the war began in July 1984; the events that occurred during the period between July 1984 and the end of 1985; and, finally, the facts bearing on the predictability of competitive harm during or at the end of that period.[3]

Background

B&W is the third largest firm in a highly concentrated industry. *Ante*, at 213. For decades, the industry has been marked by the same kind of supracompetitive pricing that is characteristic of the textbook monopoly.[4] Without the necessity of actual agreement among the six major manufacturers, "prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand." *Ibid.* Notwithstanding the controversy over the health effects of smoking and the increase in the federal excise tax, profit margins improved "handsomely" during the period between 1972 and 1983.[5]

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[3] As the majority notes, the procedural posture of this case requires that we view the evidence in the light most favorable to Liggett. *Ante*, at 213. On review of a judgment notwithstanding the verdict, the party against whom the judgment is entered "must be given the benefit of every legitimate inference that can be drawn from the evidence." See C. Wright & A. Miller, Federal Practice and Procedure § 2528, pp. 563–564 (1971).

[4] When the Court states that "[s]ubstantial evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level," *ante*, at 213, I assume it accepts the proposition that a reasonable jury could find abnormally high prices characteristic of this industry.

[5] An internal B&W memorandum, dated May 15, 1984, states in part:

"Manufacturer's price increases generally were below the rate of inflation but margins improved handsomely due to favorable leaf prices and

The early 1980's brought two new developments to the cigarette market. First, in 1980, when its share of the market had declined to 2.3%, Liggett introduced a new line of generic cigarettes in plain black and white packages, offered at an effective price of approximately 30% less than branded cigarettes. *Ante*, at 214. A B&W memorandum described this action as "the first time that a [cigarette] manufacturer has used pricing as a strategic marketing weapon in the U. S. since the depression era." App. 128. This novel tactic proved successful; by 1984, Liggett's black and whites represented about 4% of the total market and generated substantial profits. The next development came in 1984, when R. J. Reynolds (RJR), the second largest company in the industry, "repositioned" one of its established brands, Doral, by selling it at discount prices comparable to Liggett's black and whites. App. 117–118; *ante*, at 215.

B&W executives prepared a number of internal memoranda planning responses to these two market developments. See App. 120, 127, 157, 166. With respect to RJR, B&W decided to "follo[w] precisely the pathway" of that company, *id.*, at 121, reasoning that "introduction of a branded generic by B&W now appears to be feasible as RJR has the clout and sales force coverage to maintain the price on branded generics," *id.*, at 145. Accordingly, B&W planned to introduce a new "branded generic" of its own, known as Hallmark, to be sold at the same prices as RJR's Doral. *Id.*, at 124, 142–144.

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cost reductions associated with automation. For example, Brown & Williamson's variable margin increased from $2.91/M in 1972 to $8.78/M in 1981, an increase of over 200%. In 1982, the industry became much more aggressive on the pricing front, fueled by a 100% increase in the Federal Excise Tax. Brown & Williamson's variable margin increased from $10.78/M in 1982 and *[sic]* to $12.61/M in 1983.

"The impact of these pricing activities on the smoking public was dramatic. The weighted average retail price of a pack of cigarettes increased 56% between 1980 and 1983 (from $.63 to $.98)." App. 127.

B&W took a more aggressive approach to Liggett's black and whites. It decided to launch its own line of black and white cigarettes with the "[s]ame style array" and list price as Liggett's, but with "[s]uperior discounts/allowances." *Id.*, at 124. B&W estimated that its own black and whites would generate a "trading profit" of $5.1 million for the second half of 1984 and $43.6 million for 1985. *Id.*, at 125. At the same time, however, B&W, anticipating "competitive counterattacks," was "prepared to redistribute this entire amount in the form of additional trade allowances." *Ibid.* B&W's competitive stance was confined to Liggett; the memorandum outlining B&W's plans made no reference to the possibility of countermoves by RJR, or to the use of B&W's trading profits to increase allowances on any product other than black and whites.

This "dual approach" was designed to "provide B&W more influence to manage up the prices of branded generics to improve profitability," *id.*, at 123, and also the opportunity to participate in the economy market, with a view toward "manag[ing] down generic volume," *id.*, at 109. Notwithstanding its ultimate aim to "limit generic segment growth," *id.*, at 113, B&W estimated an aggregate potential trading profit on black and whites of $342 million for 1984 to 1988, *id.*, at 146. Though B&W recognized that it might be required to use "some or all of this potential trading profit" to maintain its market position, it also believed that it would recoup its losses as the segment became "more profitable, particularly as it approaches maturity." *Ibid.*

B&W began to implement its plan even before it made its first shipment of black and whites in July 1984, with a series of price announcements in June of that year. When B&W announced its first volume discount schedule for distributors, Liggett responded by increasing its own discounts. Though Liggett's discounts remained lower than B&W's, B&W responded in turn by increasing its rebates still further. After four or five moves and countermoves, the dust settled

with B&W's net prices to distributors lower than Liggett's.[6] B&W's deep discounts not only forfeited all of its $48.7 million in projected trading profits for the next 18 months, but actually resulted in sales below B&W's average variable cost. *Id.*, at 338–339.

Assessing the pre-July 1984 evidence tending to prove that B&W was motivated by anticompetitive intent, the District Court observed that the documentary evidence was "more voluminous and detailed than any other reported case. This evidence not only indicates B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment." *Liggett Group, Inc.* v. *Brown & Williamson Tobacco Corp.*, 748 F. Supp. 344, 354 (MDNC 1990).

The 18-Month Price War

The volume rebates offered by B&W to its wholesalers during the 18-month period from July 1984 to December 1985 unquestionably constituted price discrimination covered by § 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(a).[7] Nor were the discounts justified by any statutory or affirmative defense: They were not cost justified,[8] App. 525, were

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[6] On June 4, 1984, B&W announced a maximum rebate of $0.30 per carton for purchases of over 8,000 cases per quarter; a week later, Liggett announced a rebate of $0.20 on comparable volumes. On June 21, B&W increased its rebate to $0.50, and a day later, Liggett went to $0.43. After three more increases, B&W settled at $0.80 per carton, while Liggett remained at $0.73. See App. 327, 420–421.

[7] That quantity discounts are covered by the Act, and prohibited when they have the requisite effect on competition, has been firmly established since our decision in *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 42–44 (1948).

[8] "*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." § 13(a).

not good-faith efforts to meet the equally low price of a competitor,[9] and were not mere introductory or promotional discounts, 91 Tr. 42.

The rebate program was intended to harm Liggett and in fact caused it serious injury.[10] The jury found that Liggett had suffered actual damages of $49.6 million, App. 28, an amount close to, but slightly larger than, the $48.7 million trading profit B&W had indicated it would forgo in order to discipline Liggett. See *supra*, at 247. To inflict this injury, B&W sustained a substantial loss. During the full 18-month period, B&W's revenues ran consistently below its total variable costs, with an average deficiency of approximately $0.30 per carton and a total loss on B&W black and whites of almost $15 million. App. 338–339. That B&W executives were willing to accept losses of this magnitude during the entire 18 months is powerful evidence of their belief that prices ultimately could be "managed up" to a level that would allow B&W to recoup its investment.

The Aftermath

At the end of 1985, the list price of branded cigarettes was $33.15 per carton, and the list price of black and whites, $19.75 per carton. App. 325. Over the next four years, the list price on both branded and black and white cigarettes

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[9] "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." § 13(b).

The jury gave a negative answer to the following special issue:

"3. Did Brown & Williamson engage in price discrimination in good faith with the intention to meet, but not beat, the equally low net prices of Liggett Group, Inc.?" App. 27–28.

[10] By offering its largest discounts to Liggett's 14 largest customers, App. 168–169, 174, B&W not only put its "money where the volume is," *id.*, at 402, but also applied maximum pressure to Liggett at a lesser cost to itself than would have resulted from a nondiscriminatory price cut.

increased twice a year, by identical amounts. The June 1989 increases brought the price of branded cigarettes to $46.15 per carton, and the price of black and whites to $33.75—an amount even higher than the price for branded cigarettes when the war ended in December 1985. *Ibid.*[11] Because the rate of increase was higher on black and whites than on brandeds, the price differential between the two types of cigarettes narrowed, *ibid.*, from roughly 40% in 1985 to 27% in 1989. See 964 F. 2d, at 338.

The expert economist employed by Liggett testified that the post-1985 price increases were unwarranted by increases in manufacturing or other costs, taxes, or promotional expenditures. App. 525. To be sure, some portion of the volume rebates granted distributors was passed on to consumers in the form of promotional activity, so that consumers did not feel the full brunt of the price increases. Nevertheless, the record amply supports the conclusion that the post-1985 price increases in list prices produced higher consumer prices, as well as higher profits for the manufacturers.[12]

The legal question presented by this evidence is whether the facts as they existed during and at the close of the 18-month period, and all reasonable inferences to be drawn from

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[11] It is also true that these same years, other major manufacturers entered the generic market and expanded their generic sales. *Ante*, at 217. Their entry is entirely consistent with the possibility that lockstep increases in the price of generics brought them to a level that was supracompetitive, though lower than that charged on branded cigarettes.

[12] "Q Does this mean that the price increases, which you testified are happening twice a year, are used up in these consumer promotions?

"A Not by any stretch of the imagination. Although there has been an increase in the use of this type of promotional activity over the last four or five years, the increase in that promotional activity has been far outstripped by the list price increases. The prices go up by a lot; the promotional activity, indeed, does go up. But the promotional activity has not gone up by anywhere near the magnitude of the list price increases. Further, those price increases are not warranted by increasing costs, since the manufacturing costs of making cigarettes have remained roughly constant over the last five years." App. 509.

those facts, see n. 3, *supra*, justified the finding by the jury that B&W's discriminatory pricing campaign "had a reasonable possibility of injuring competition," see *supra*, at 244, and n. 2.

II

The Sherman Act, 26 Stat. 209, enacted in 1890, the Clayton Act, 38 Stat. 730, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition. Because they have a common goal, the statutes are similar in many respects. All three prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits. Sales below cost and anticompetitive intent are elements of the violation of all three statutes. Neither of those elements, however, is at issue in this case. See *ante*, at 231 (record contains sufficient evidence of anticompetitive intent and below-cost pricing).

The statutes do differ significantly with respect to one element of the violation, the competitive consequences of predatory conduct. Even here, however, the three statutes have one thing in common: Not one of them requires proof that a predatory plan has actually succeeded in accomplishing its objective. Section 1 of the Sherman Act requires proof of a conspiracy. It is the joint plan to restrain trade, however, and not its success, that is prohibited by § 1. *Nash* v. *United States*, 229 U. S. 373, 378 (1913). Section 2 of the Sherman Act applies to independent conduct, and may be violated when there is a "dangerous probability" that an attempt to achieve monopoly power will succeed. *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905). The Clayton Act goes beyond the "dangerous probability" standard to cover price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." § 2, 38 Stat. 730.

The element of competitive injury as defined in the Robinson-Patman Act is broader still.[13] See S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936) (Act substantially broadens similar clause of Clayton Act).[14] The Robinson-Patman Act was designed to reach discriminations "in their incipiency, before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co.* v. *FTC*, 324 U. S. 726, 738 (1945) (internal quotation marks omitted). Or, as the Report of the Senate Judiciary Committee on the proposed Act explained, "to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, at 4.

Accordingly, our leading case concerning discriminatory volume rebates described the scope of the Act as follows:

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[13] See text of statute, n. 1, *supra*.

[14] One of the purposes of broadening the Clayton Act's competitive injury language in the Robinson-Patman Act was to provide more effective protection against predatory price cutting. As the Attorney General's National Committee to Study the Antitrust Laws explained in its 1955 report:

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of 'injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to check the victimization of individual businessmen by predatory price cuts that nevertheless created no *general* impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the 'injury' clause of the Robinson-Patman Act." Report of the Attorney General's National Committee to Study the Antitrust Laws 165–166 (1955) (footnotes omitted).

> "There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 742." *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 46 (1948).

See also *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 435 (1983) ("In keeping with the Robinson-Patman Act's prophylactic purpose, § 2(a) does not require that the discriminations must in fact have harmed competition" (internal quotation marks omitted)).

In this case, then, Liggett need not show any actual harm to competition, but only the reasonable possibility that such harm would flow from B&W's conduct. The evidence presented supports the conclusion that B&W's price war was intended to discipline Liggett for its unprecedented use of price competition in an industry that had enjoyed handsome supracompetitive profits for about half a century. The evidence also demonstrates that B&W executives were confident enough in the feasibility of their plan that they were willing to invest millions of company dollars in its outcome. And all of this, of course, must be viewed against a background of supracompetitive, parallel pricing, in which "prices for cigarettes increased in lockstep, twice a year . . . irrespective of the rate of inflation, changes in the cost of production, or shifts in consumer demand," *ante*, at 213, bringing with them dramatic increases in profit margins, see n. 5, *supra*. In this context, it is surely fair to infer that B&W's discipli-

nary program had a reasonable prospect of persuading Liggett to forgo its maverick price reductions and return to parallel pricing policies, and thus to restore the same kind of supracompetitive pricing that had characterized the industry in the past. When the facts are viewed in the light most favorable to Liggett, I think it clear that there is sufficient evidence in the record that the "reasonable possibility" of competitive injury required by the statute actually existed.

III

After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B&W engaged in price discrimination with a "reasonable possibility of injuring competition." 748 F. Supp., at 348, n. 4; n. 2, *supra*. The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence.

First, as a matter of law, the Court reminds us that the Robinson-Patman Act is concerned with consumer welfare and competition, as opposed to protecting individual competitors from harm; "the antitrust laws were passed for the protection of competition, not competitors." See *ante*, at 224 (internal quotations marks and emphasis omitted). For that reason, predatory price cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits. *Ibid.* The jury, of course, was so instructed, see n. 2, *supra*, and no one questions that proposition here.

As a matter of fact, the Court emphasizes the growth in the generic segment following B&W's entry. As the Court notes, generics' expansion to over 12% of the total market by 1988 exceeds B&W's own forecast that the segment would grow to only about 10%, assuming no entry by B&W. *Ante*, at 234. What these figures do not do, however, is answer the

relevant question: whether the prices of generic cigarettes during the late 1980's were competitive or supracompetitive.

On this point, there is ample, uncontradicted evidence that the list prices on generic cigarettes, as well as the prices on branded cigarettes, rose regularly and significantly during the late 1980's, in a fashion remarkably similar to the price change patterns that characterized the industry in the 1970's when supracompetitive, oligopolistic pricing admittedly prevailed. See *supra*, at 245; *ante*, at 213. Given its knowledge of the industry's history of parallel pricing, I think the jury plainly was entitled to draw an inference that these increased prices were supracompetitive.

The Court responds to this evidence dismissively, suggesting that list prices have no bearing on the question because promotional activities of the cigarette manufacturers may have offset such price increases. *Ante*, at 235–236. That response is insufficient for three reasons. First, the promotions to which the majority refers related primarily to branded cigarettes; accordingly, while they narrowed the differential between branded prices and black and white prices, they did not reduce the consumer price of black and whites. See 33 Tr. 208–210. Second, the Court's speculation is inconsistent with record evidence that the semiannual list price increases were not offset by consumer promotions. See n. 12, *supra*. See also *ante*, at 218 ("at least some portion of the list price increase was reflected in a higher net price to the consumer"). Finally, to the extent there is a dispute regarding the effect of promotional activities on consumer prices for generics, the jury presumably resolved that dispute in Liggett's favor, and the Court's contrary speculation is an insufficient basis for setting aside that verdict.[15]

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[15] In finding an absence of actual supracompetitive pricing, the Court also relies on the testimony of Liggett executives, who stated that industry prices were fair. Illustrative is the following exchange:

"Q I want to know—yes or no—sir, whether or not you say that the price you charged for branded cigarettes, which is the same price you say

As a matter of economics, the Court reminds us that price cutting is generally procompetitive, and hence a "boon to consumers." *Ante*, at 224. This is true, however, only so long as reduced prices do not fall below cost, as the cases cited by the majority make clear.[16] When a predator deliberately engages in below-cost pricing targeted at a particular competitor over a sustained period of time, then price cutting raises a credible inference that harm to compe-

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everybody else charged, was a fair and equitable price for that product to the American consumer.

"A It's what the industry set, and based on that it's a fair price." App. 396.

The problem with this testimony, and testimony like it, is that it relates to the period before the price war, as well as after, see *id.*, at 392, when there is no real dispute but that prices were supracompetitive. ("[T]he profits in the cigarette industry are the best of any industry I've been associated with, very much so." *Ibid.*) Some of the testimony cited by the Court, for instance, is that of an outside director who served only from 1977 or 1978 until 1980, see 64 Tr. 51–56, cited *ante*, at 237; his belief in the competitiveness of his industry must be viewed against the "[s]ubstantial evidence suggest[ing] that in recent decades, the industry reaped the benefits of prices above a competitive level" to which the majority itself refers, *ante*, at 213.

The jury was, of course, entitled to discount the probative force of testimony from executives to the effect that there was no collusion among tobacco manufacturers, App. 397–398, and that they had appeared before a congressional committee to vouch for the competitive nature of their industry, *id.*, at 623–631. The jury was also free to give greater weight to the documentary evidence presented, the inferences to be drawn therefrom, and the testimony of experts who agreed with the textbook characterization of the industry. See App. 640–645; R. Tennant, American Cigarette Industry 342 (1950).

[16] In *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 339–340 (1990), for example, we noted that low prices benefit consumers "so long as they are above predatory levels." In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104, 118 (1986), we recognized that price cutting of a predatory nature is "inimical" to competition, and limited our approving comments to pricing that is "above some measure of incremental costs." *Id.*, at 117–118, and n. 12 (internal quotation marks omitted).

tition is likely to ensue.[17] None of our cases disputes that proposition.

Also as a matter of economics, the Court insists that a predatory pricing program in an oligopoly is unlikely to succeed absent actual conspiracy. Though it has rejected a somewhat stronger version of this proposition as a rule of decision, see *ante*, at 229–230, the Court comes back to the same economic theory, relying on the supposition that an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly," *ante*, at 228. See *ante*, at 238–243 (implausibility of tacit coordination among cigarette oligopolists in 1980's). I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart.[18] In any event, the jury was

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[17] *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 696–698, and n. 12 (1967). See also *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F. 2d 582, 596 (CA8 1987) (threat to competition may be shown by predatory intent, combined with injury to competitor), cert. denied, 484 U. S. 1010 (1988); *Double H Plastics, Inc.* v. *Sonoco Products Co.*, 732 F. 2d 351, 354 (CA3) (threat to competition may be shown by evidence of predatory intent, in form of below-cost pricing), cert. denied, 469 U. S. 900 (1984); *D. E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F. 2d 1431, 1439 (CA6 1983) (anticompetitive effect may be proven inferentially from anticompetitive intent), cert. denied, 467 U. S. 1242 (1984). See generally *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918) (in determining whether rule violates antitrust law, "knowledge of intent may help the court to interpret facts and to predict consequences").

[18] Judge Easterbrook has made the same point:

"Wisdom lags far behind the market

. . . . . .

"[L]awyers know less about the business than the people they represent . . . . The judge knows even less about the business than the lawyers." Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 5 (1984).

surely entitled to infer that at the time of the price war itself, B&W reasonably believed that it could signal its intentions to its fellow oligopolists, see App. 61, assuring their continued cooperation.

Perhaps the Court's most significant error is the assumption that seems to pervade much of the final sections of its opinion: that Liggett had the burden of proving either the actuality of supracompetitive pricing, or the actuality of tacit collusion. See *ante*, at 233–237 (finding absence of actual supracompetitive pricing), 238–243 (finding absence of evidence suggesting actual coordination). In my opinion, the jury was entitled to infer from the succession of price increases after 1985—when the prices for branded and generic cigarettes increased every six months from $33.15 and $19.75, respectively, to $46.15 and $33.75—that B&W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. See *supra*, at 255. But even if that were not so clear, the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried a "reasonable possibility" of injuring competition.

Accordingly, I respectfully dissent.

Syllabus

BUCKLEY *v.* FITZSIMMONS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-7849. Argued February 22, 1993—Decided June 24, 1993

Petitioner Buckley sought damages, under 42 U. S. C. § 1983, from respondent prosecutors for fabricating evidence during the preliminary investigation of a highly publicized rape and murder in Illinois and making false statements at a press conference announcing the return of an indictment against him. He claimed that when three separate lab studies failed to make a reliable connection between a bootprint at the murder site and his boots, respondents obtained a positive identification from one Robbins, who allegedly was known for her willingness to fabricate unreliable expert testimony. Thereafter, they convened a grand jury for the sole purpose of investigating the murder, and 10 months later, respondent Fitzsimmons, the State's Attorney, announced the indictment at the news conference. Buckley was arrested and, unable to meet the bond, held in jail. Robbins provided the principal evidence against him at trial, but the jury was unable to reach a verdict. When Robbins died before Buckley's retrial, all charges were dropped and he was released after three years of incarceration. In the § 1983 action, the District Court held that respondents were entitled to absolute immunity for the fabricated evidence claim but not for the press conference claim. However, the Court of Appeals ruled that they had absolute immunity on both claims, theorizing that prosecutors are entitled to absolute immunity when out-of-court acts cause injury only to the extent a case proceeds in court, but are entitled only to qualified immunity if the constitutional wrong is complete before the case begins. On remand from this Court, it found that nothing in *Burns* v. *Reed*, 500 U. S. 478—in which the Court held that prosecutors had absolute immunity for their actions in participating in a probable-cause hearing but not in giving advice to the police—undermined its initial holding.

Held: Respondents are not entitled to absolute immunity. Pp. 267–278.

(a) Certain immunities were so well established when § 1983 was enacted that this Court presumes that Congress would have specifically so provided had it wished to abolish them. Most public officials are entitled only to qualified immunity. However, sometimes their actions fit within a common-law tradition of absolute immunity. Whether they do is determined by the nature of the function performed, not the identity of the actor who performed it, *Forrester* v. *White*, 484 U. S. 219, 229,

Syllabus

and it is available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U. S. 409, 430. Pp. 267–271.

(b) Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. However, in endeavoring to determine whether the bootprint had been made by Buckley, respondents were acting not as advocates but as investigators searching for clues and corroboration that might give them probable cause to recommend an arrest. Such activities were not immune from liability at common law. If performed by police officers and detectives, such actions would be entitled to only qualified immunity; the same immunity applies to prosecutors performing those actions. Convening a grand jury to consider the evidence their work produced does not retroactively transform that work from the administrative into the prosecutorial. Pp. 271–276.

(c) Fitzsimmons' statements to the media also are not entitled to absolute immunity. There was no common-law immunity for prosecutor's out-of-court statements to the press, and, under *Imbler*, such comments have no functional tie to the judicial process just because they are made by a prosecutor. Nor do policy considerations support extending absolute immunity to press statements, since this Court has no license to establish immunities from § 1983 actions in the interests of what it judges to be sound public policy, and since the presumption is that qualified, rather than absolute, immunity is sufficient to protect government officials in the exercise of their duties. Pp. 276–278.

952 F. 2d 965, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and IV–B, and the opinion of the Court with respect to Parts IV–A and V, in which BLACKMUN, O'CONNOR, SCALIA, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 279. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SOUTER, JJ., joined, *post*, p. 282.

G. Flint Taylor argued the cause for petitioner. With him on the briefs was *John L. Stainthorp.*

James G. Sotos argued the cause and filed a brief for respondents.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief

were *Solicitor General Starr, Assistant Attorney General Gerson,* and *Deputy Solicitor General Mahoney.**

JUSTICE STEVENS delivered the opinion of the Court.

In an action brought under 42 U. S. C. § 1983, petitioner seeks damages from respondent prosecutors for allegedly fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment. The questions presented are whether respondents are absolutely immune from liability on either or both of these claims.

As the case comes to us, we have no occasion to consider whether some or all of respondents' conduct may be protected by qualified immunity. Moreover, we make two important assumptions about the case: first, that petitioner's allegations are entirely true; and, second, that they allege constitutional violations for which § 1983 provides a remedy. Our statement of facts is therefore derived entirely from petitioner's complaint and is limited to matters relevant to respondents' claim to absolute immunity.

I

Petitioner commenced this action on March 4, 1988, following his release from jail in Du Page County, Illinois. He had been incarcerated there for three years on charges growing out of the highly publicized murder of Jeanine Nicarico, an 11-year-old child, on February 25, 1983. The complaint named 17 defendants, including Du Page County, its sheriff and seven of his assistants, two expert witnesses and the estate of a third, and the five respondents.

Respondent Fitzsimmons was the duly elected Du Page County State's Attorney from the time of the Nicarico

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**Michael D. Bradbury* filed a brief for the Appellate Committee of the California District Attorneys Association as *amicus curiae.*

murder through December 1984, when he was succeeded by respondent Ryan, who had defeated him in a Republican primary election on March 21, 1984. Respondent Knight was an assistant state's attorney under Fitzsimmons and served as a special prosecutor in the Nicarico case under Ryan. Respondents Kilander (who came into office with Ryan) and King were assistant prosecutors, also assigned to the case.

The theory of petitioner's case is that in order to obtain an indictment in a case that had engendered "extensive publicity" and "intense emotions in the community," the prosecutors fabricated false evidence, and that in order to gain votes, Fitzsimmons made false statements about petitioner in a press conference announcing his arrest and indictment 12 days before the primary election. Petitioner claims that respondents' misconduct created a "highly prejudicial and inflamed atmosphere" that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom, mental anguish, and humiliation.

The fabricated evidence related to a bootprint on the door of the Nicarico home apparently left by the killer when he kicked in the door. After three separate studies by experts from the Du Page County Crime Lab, the Illinois Department of Law Enforcement, and the Kansas Bureau of Identification, all of whom were unable to make a reliable connection between the print and a pair of boots that petitioner had voluntarily supplied, respondents obtained a "positive identification" from one Louise Robbins, an anthropologist in North Carolina who was allegedly well known for her willingness to fabricate unreliable expert testimony. Her opinion was obtained during the early stages of the investigation, which was being conducted under the joint supervision and direction of the sheriff and respondent Fitzsimmons, whose

police officers and assistant prosecutors were performing essentially the same investigatory functions.[1]

Thereafter, having failed to obtain sufficient evidence to support petitioner's (or anyone else's) arrest, respondents convened a special grand jury for the sole purpose of investi-

[1] The relevant period and prosecutorial functions are described in petitioner's first amended complaint:

"28) Defendant Knight, and various others [sic] Defendants, including Doria, Fitzsimmons, and Burandt, apparently not satisfied with Defendant German's conclusions, contacted anthropologist Louise Robbins and Defendant Olsen of the Kansas Bureau of Indentification [sic] Crime Lab in search of a positive boot identification.

. . . . .

"31) Confronted with three different expert reports which failed to match Plaintiff's boot with the footprint on the door, the Defendants, including Knight, Burandt, and German, procured their 'positive identification' from Louise Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these Defendants knew or should have known.

"32) Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including defendants Wilkosz and Kurzawa, at the direction and under the supervision, and sometimes in the presence and with the assistance of Defendants Knight, King, Soucek and Lepic, repeatedly interrogated alleged suspects, including Plaintiff Buckley and Alex Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, Plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to the Defendants.

"33) As a result of these interrogations, at least one experienced Sheriff's detective who participated[,] concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint 'evidence.'

"34) He repeatedly communicated his conclusion, and its basis, to the Defendants named herein, including Defendants Doria, Knight, King, Soucek, Lepic, and Wilkosz.

"35) Unable to solve the case, Defendants Doria, Fitzsimmons, Knight and King convened a special Du Page County 'investigative' grand jury, devoted solely to investigating the Nicarico case." App. 8–10.

gating the Nicarico case. After an 8-month investigation, during which the grand jury heard the testimony of over 100 witnesses, including the bootprint experts, it was still unable to return an indictment. On January 27, 1984, respondent Fitzsimmons admitted in a public statement that there was insufficient evidence to indict anyone for the rape and murder of Jeanine Nicarico. Although no additional evidence was obtained in the interim, the indictment was returned in March, when Fitzsimmons held the defamatory press conference so shortly before the primary election. Petitioner was then arrested, and because he was unable to meet the bond (set at $3 million), he was held in jail.

Petitioner's trial began 10 months later, in January 1985. The principal evidence against him was provided by Robbins, the North Carolina anthropologist. Because the jury was unable to reach a verdict on the charges against petitioner, the trial judge declared a mistrial. Petitioner remained in prison for two more years, during which a third party confessed to the crime and the prosecutors prepared for petitioner's retrial. After Robbins died, however, all charges against him were dropped. He was released, and filed this action.

II

We are not concerned with petitioner's actions against the police officers (who have asserted the defense of qualified immunity), against the expert witnesses (whose trial testimony was granted absolute immunity by the District Court, App. 53–57), and against Du Page County (whose motion to dismiss on other grounds was granted in part, *id.*, at 57–61). At issue here is only the action against the prosecutors, who moved to dismiss based on their claim to absolute immunity. The District Court held that respondents were entitled to absolute immunity for all claims except the claim against Fitzsimmons based on his press conference. *Id.*, at 53. With respect to the claim based on the alleged fabrication of evidence, the District Court framed the question as whether

the effort "to obtain definitive boot evidence linking [petitioner to the crime] was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process." *Id.*, at 45. The Court concluded that it "appears" that it was more evaluative than acquisitive.

Both petitioner and Fitzsimmons appealed, and a divided panel of the Court of Appeals for the Seventh Circuit ruled that the prosecutors had absolute immunity on both claims. *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230 (1990). In the Court of Appeals' view, "damages remedies are unnecessary," *id.*, at 1240, when "[c]ourts can curtail the costs of prosecutorial blunders . . . by cutting short the prosecution or mitigating its effects," *id.*, at 1241. Thus, when "out-of-court acts cause injury only to the extent a case proceeds" in court, *id.*, at 1242, the prosecutor is entitled to absolute immunity and "the defendant must look to the court in which the case pends to protect his interests," *id.*, at 1241. By contrast, if "a constitutional wrong is complete before the case begins," the prosecutor is entitled only to qualified immunity. *Id.*, at 1241–1242. Applying this unprecedented theory to petitioner's allegations, the Court of Appeals concluded that neither the press conference nor the fabricated evidence caused any constitutional injury independent of the indictment and trial. *Id.*, at 1243, 1244.[2]

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[2] With respect to an issue not before us, petitioner's claims that he was subject to coercive interrogations by some of the respondent prosecutors, the court found that the extent of immunity depended on the nature of those claims. The court reasoned that, because claims based on *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and the Self-Incrimination Clause of the Fifth Amendment depend on what happens at trial, prosecutors are entitled to absolute immunity for those claims; by contrast, only qualified immunity is available against petitioner's claims as to "coercive tactics that are independently wrongful." 919 F. 2d, at 1244. Because it could not characterize the nature of those claims, the court remanded for further proceedings concerning Fitzsimmons, King, and Knight on this issue. *Id.*, at 1245.

Judge Fairchild dissented in part. He agreed with the District Court that Fitzsimmons was entitled only to qualified immunity for his press statements. He noted that the majority had failed to examine the particular function that Fitzsimmons was performing, and concluded that conducting a press conference was not among "the functions that entitle judges and prosecutors in the judicial branch to absolute immunity." *Id.*, at 1246 (opinion dissenting in part and concurring in part). Responding directly to the majority's reasoning, he wrote:

> "It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity." *Ibid.*

We granted Buckley's petition for certiorari, vacated the judgment, and remanded the case for further proceedings in light of our intervening decision in *Burns* v. *Reed*, 500 U. S. 478 (1991). 502 U. S. 801 (1991). On remand, the same panel, again divided, reaffirmed its initial decision, with one modification not relevant here. 952 F. 2d 965 (CA7 1992) *(per curiam)*. The Court of Appeals held that "[n]othing in *Burns* undermine[d]" its initial holding that prosecutors are absolutely immune for "normal preparatory steps"; unlike the activities at issue in *Burns*, "[t]alking with (willing) experts is trial preparation." 952 F. 2d, at 966–967. In similar fashion, the court adhered to its conclusion that Fitzsimmons was entitled to absolute immunity for conducting the press conference. The court recognized that the press conference bore some similarities to the conduct in *Burns* (advising the police as to the propriety of an arrest). It did not take place in court, and it was not part of the prosecutor's

trial preparation. 952 F. 2d, at 967. The difference, according to the court, is that "[a]n arrest causes injury whether or not a prosecution ensues," whereas the only constitutional injury caused by the press conference depends on judicial action. *Ibid.*

Judge Fairchild again dissented. He adhered to his earlier conclusion that Fitzsimmons was entitled to only qualified immunity for the press conference, but he was also persuaded that *Burns* had drawn a line between "'conduct closely related to the judicial process'" and conduct in the role of "'administrator or investigative officer.'" He agreed that trial preparation falls on the absolute immunity side of that line, but felt otherwise about the search for favorable evidence that might link the bootprint to petitioner during "a year long pre-arrest and pre-indictment investigation" aggressively supervised by Fitzsimmons. 952 F. 2d, at 969 (opinion dissenting in part).

We granted certiorari for a second time, limited to issues relating to prosecutorial immunity. 506 U. S. 814 (1992).[3] We now reverse.

III

The principles applied to determine the scope of immunity for state officials sued under Rev. Stat. § 1979, as amended,

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[3] Although petitioner also alleged that respondents violated his constitutional rights in presenting the fabricated evidence to the grand jury and his trial jury, see App. 10–11, 14–15, we are not presented with any question regarding those claims. The Court of Appeals agreed with the District Court, see *id.*, at 45–47, and held that those actions were protected by absolute immunity. *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230, 1243 (CA7 1990) ("The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury"). That decision was made according to traditional principles of absolute immunity under § 1983, however, and did not depend on the original, injury-focused theory of absolute prosecutorial immunity with which we are concerned here; nor was it included within the questions presented in petitioner's petition for certiorari.

42 U. S. C. § 1983, are by now familiar. Section 1983 on its face admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), however, we held that Congress did not intend § 1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when § 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them. *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). See also *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981). Although we have found immunities in § 1983 that do not appear on the face of the statute, "[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984). "[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986).

Since *Tenney*, we have recognized two kinds of immunities under § 1983. Most public officials are entitled only to qualified immunity. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982); *Butz* v. *Economou*, 438 U. S. 478, 508 (1978). Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S., at 818. In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz* v. *Economou*, 438 U. S., at 506.

We have recognized, however, that some officials perform "special functions" which, because of their similarity to func-

tions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability. *Id.*, at 508. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns* v. *Reed*, 500 U. S., at 486; *Antoine* v. *Byers & Anderson, Inc.*, 508 U. S. 429, 432, and n. 4 (1993). Even when we can identify a common-law tradition of absolute immunity for a given function, we have considered "whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower* v. *Glover*, 467 U. S., at 920. Not surprisingly, we have been "quite sparing" in recognizing absolute immunity for state actors in this context. *Forrester* v. *White*, 484 U. S. 219, 224 (1988).

In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a "functional approach," see, *e. g.*, *Burns*, 500 U. S., at 486, which looks to "the nature of the function performed, not the identity of the actor who performed it," *Forrester* v. *White*, 484 U. S., at 229. We have twice applied this approach in determining whether the functions of contemporary prosecutors are entitled to absolute immunity.

In *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), we held that a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the State's case at trial. Noting that our earlier cases had been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it," *id.*, at 421, we focused on the functions of the prosecutor that had most often invited common-law tort actions. We concluded that the common-law rule of immunity for prosecutors was "well settled" and that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immu-

nity under § 1983." *Id.*, at 424. Those considerations[4] supported a rule of absolute immunity for conduct of prosecutors that was "intimately associated with the judicial phase of the criminal process." *Id.*, at 430. In concluding that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983," we did not attempt to describe the line between a prosecutor's acts in preparing for those functions, some of which would be absolutely immune, and his acts of investigation or "administration," which would not. *Id.*, at 431, and n. 33.

We applied the *Imbler* analysis two Terms ago in *Burns* v. *Reed*, 500 U. S. 478 (1991). There the § 1983 suit challenged two acts by a prosecutor: (1) giving legal advice to the police on the propriety of hypnotizing a suspect and on whether probable cause existed to arrest that suspect, and (2) participating in a probable-cause hearing. We held that only the latter was entitled to absolute immunity. Immunity for that action under § 1983 accorded with the common-law absolute immunity of prosecutors and other attorneys for eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during, and related to, judicial proceedings. *Id.*, at 489–490; *id.*, at 501 (SCALIA, J., concurring in judgment in part and dissenting in

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[4] In particular, we expressed concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his "energy and attention . . . from the pressing duty of enforcing the criminal law." *Imbler* v. *Pachtman*, 424 U. S., at 424–425. Suits against prosecutors would devolve into "a virtual retrial of the criminal offense of a new forum," *id.*, at 425, and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive not "to go forward with a close case where an acquittal likely would trigger a suit against him for damages," *id.*, at 426, and n. 24. We also expressed concern that the availability of a damages action might cause judges to be reluctant to award relief to convicted defendants in post-trial motions. *Id.*, at 427.

part). Under that analysis, appearing before a judge and presenting evidence in support of a motion for a search warrant involved the prosecutor's "'role as advocate for the State.'" *Id.*, at 491, quoting *Imbler*, 424 U. S., at 431, n. 33. Because issuance of a search warrant is a judicial act, appearance at the probable-cause hearing was "'intimately associated with the judicial phase of the criminal process,'" *Burns*, 500 U. S., at 492, quoting *Imbler*, 424 U. S., at 430.

We further decided, however, that prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police. We were unable to identify any historical or common-law support for absolute immunity in the performance of this function. 500 U. S., at 492–493. We also noted that any threat to the judicial process from "the harassment and intimidation associated with litigation" based on advice to the police was insufficient to overcome the "[a]bsen[ce] [of] a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*." *Id.*, at 493, 494. And though we noted that several checks other than civil litigation prevent prosecutorial abuses in advising the police, "one of the most important checks, the judicial process," will not be effective in all cases, especially when in the end the suspect is not prosecuted. *Id.*, at 496. In sum, we held that providing legal advice to the police was not a function "closely associated with the judicial process." *Id.*, at 495.

IV

In this case the Court of Appeals held that respondents are entitled to absolute immunity because the injuries suffered by petitioner occurred during criminal proceedings. That holding is contrary to the approach we have consistently followed since *Imbler*. As we have noted, the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful. The location of the

injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages (a question that this case does not present, see *supra*, at 261). It is irrelevant, however, to the question whether the conduct of a prosecutor is protected by absolute immunity. Accordingly, although the Court of Appeals' reasoning may be relevant to the proper resolution of issues that are not before us, it does not provide an acceptable basis for concluding that either the preindictment fabrication of evidence or the post-indictment press conference was a function protected by absolute immunity. We therefore turn to consider each of respondents' claims of absolute immunity.

A

We first address petitioner's argument that the prosecutors are not entitled to absolute immunity for the claim that they conspired to manufacture false evidence that would link his boot with the bootprint the murderer left on the front door. To obtain this false evidence, petitioner submits, the prosecutors shopped for experts until they found one who would provide the opinion they sought. App. 7–9. At the time of this witness shopping the assistant prosecutors were working hand in hand with the sheriff's detectives under the joint supervision of the sheriff and State's attorney Fitzsimmons.

Petitioner argues that *Imbler*'s protection for a prosecutor's conduct "in initiating a prosecution and in presenting the State's case," 424 U. S., at 431, extends only to the act of initiation itself and to conduct occurring in the courtroom. This extreme position is plainly foreclosed by our opinion in *Imbler* itself. We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity. *Id.*, at 431, n. 33. We noted in particular that an out-of-court "effort to control the presen-

tation of [a] witness' testimony" was entitled to absolute immunity because it was "fairly within [the prosecutor's] function as an advocate." *Id.*, at 430, n. 32. To be sure, *Burns* made explicit the point we had reserved in *Imbler*, 424 U. S., at 430–431, and n. 33: A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. See *Burns*, 500 U. S., at 494–496. We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

On the other hand, as the function test of *Imbler* recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. Qualified immunity "'represents the norm'" for executive officers, *Malley* v. *Briggs*, 475 U. S., at 340, quoting *Harlow* v. *Fitzgerald*, 457 U. S., at 807, so when a prosecutor "functions as an administrator rather than as an officer of the court" he is entitled only to qualified immunity. *Imbler*, 424 U. S., at 431, n. 33. There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Hampton* v. *Chicago*, 484 F. 2d 602, 608 (CA7 1973)

(internal quotation marks omitted), cert. denied, 415 U. S. 917 (1974). Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." 484 F. 2d, at 608–609.

The question, then, is whether the prosecutors have carried their burden of establishing that they were functioning as "advocates" when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by petitioner's foot. A careful examination of the allegations concerning the conduct of the prosecutors during the period before they convened a special grand jury to investigate the crime provides the answer. See *supra*, at 263, n. 1. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.[5]

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[5] Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, as the opinion dissenting in part points out, *post*, at 290, a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity.

Furthermore, there is no "true anomaly," *post*, at 286, in denying absolute immunity for a state actor's investigative acts made before there is probable cause to have a suspect arrested just because a prosecutor would be entitled to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict. That criticism ignores the essence of the function test. The reason that lack of probable cause allows us to deny absolute immunity to a state actor for the former function (fabrication of evidence) is that there is no common-law tradition of immunity for it, whether performed by a police officer or prosecutor. The reason that we grant it for the latter function (malicious prosecution) is that we have found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not. By insisting on an equation of the two functions merely because a prosecutor

It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was empaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him. Under these circumstances, the prosecutors' conduct occurred well before they could properly claim to be acting as advocates. Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983. It therefore remains protected only by qualified immunity.

After *Burns*, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested.[6] That the prosecutors later called

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might be subject to liability for one but not the other, the dissent allows its particular policy concerns to erase the function test it purports to respect.

In general, the dissent's distress over the denial of absolute immunity for prosecutors who fabricate evidence regarding unsolved crimes, *post*, at 283–285, like the holding of the Court of Appeals, seems to conflate the question whether a § 1983 plaintiff has stated a cause of action with the question whether the defendant is entitled to absolute immunity for his actions.

[6] Cf. *Burns* v. *Reed*, 500 U. S. 478, 495 (1991): "Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. . . . Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." If the police, under the guidance of the prosecutors, had solicited the alleg-

a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial.[7] A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

B

We next consider petitioner's claims regarding Fitzsimmons' statements to the press. Petitioner alleged that, during the prosecutor's public announcement of the indictment, Fitzsimmons made false assertions that numerous pieces of evidence, including the bootprint evidence, tied Buckley to a burglary ring that committed the Nicarico murder. App. 12. Petitioner also alleged that Fitzsimmons released mug shots of him to the media, "which were prominently and repeatedly displayed on television and in the newspapers." *Ibid.* Peti-

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edly "fabricated" testimony, of course, they would not be entitled to anything more than qualified immunity.

[7] See *Imbler* v. *Pachtman*, 424 U. S. 409, 431, n. 33 (1976): "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them." Although the respondents rely on the first sentence of this passage to suggest that a prosecutor's actions in "obtaining, reviewing, and evaluating" evidence are always protected by absolute immunity, the sentence that follows qualifies that suggestion. It confirms that some of these actions may fall on the administrative, rather than the judicial, end of the prosecutor's activities, and therefore be entitled only to qualified immunity.

tioner's legal theory is that "[t]hese false and prejudicial statements inflamed the populace of DuPage County against" him, *ibid.*; see also *id.*, at 14, thereby defaming him, resulting in deprivation of his right to a fair trial, and causing the jury to deadlock rather than acquit, *id.*, at 19.

Fitzsimmons' statements to the media are not entitled to absolute immunity. Fitzsimmons does not suggest that in 1871 there existed a common-law immunity for a prosecutor's, or attorney's, out-of-court statement to the press. The Court of Appeals agreed that no such historical precedent exists. 952 F. 2d, at 967. Indeed, while prosecutors, like all attorneys, were entitled to absolute immunity from defamation liability for statements made during the course of judicial proceedings and relevant to them, see *Burns*, 500 U. S., at 489–490; *Imbler*, 424 U. S., at 426, n. 23; *id.*, at 439 (WHITE, J., concurring in judgment), most statements made out of court received only good-faith immunity. The common-law rule was that "[t]he speech of a counsel is privileged by the occasion on which it is spoken . . . ." *Flint* v. *Pike*, 4 Barn. & Cress. 473, 478, 107 Eng. Rep. 1136, 1138 (K. B. 1825) (Bayley, J.).[8]

The functional approach of *Imbler*, which conforms to the common-law theory, leads us to the same conclusion. Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the

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[8] "[Absolute immunity] does not apply to or include any publication of defamatory matter before the commencement, or after the termination of the judicial proceeding (unless such publication is an act incidental to the proper initiation thereof, or giving legal effect thereto); nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings." Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 489 (1909) (footnotes omitted). See, *e. g.*, *Viosca* v. *Landfried*, 140 La. 610, 615, 73 So. 698, 700 (1916); *Youmans* v. *Smith*, 153 N. Y. 214, 220–223, 47 N. E. 265, 267–268 (1897). See also G. Bower, Law of Actionable Defamation 103, n. *h*, 104–105 (1908).

press conference, Fitzsimmons did not act in "'his role as advocate for the State,'" *Burns* v. *Reed*, 500 U. S., at 491, quoting *Imbler* v. *Pachtman*, 424 U. S., at 431, n. 33. The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, see National District Attorneys Assn., National Prosecution Standards 107, 110 (2d ed. 1991), and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and, as noted, *supra*, at 268, 277, qualified immunity is the norm for them.

Fitzsimmons argues nonetheless that policy considerations support extending absolute immunity to press statements. Brief for Respondents 30–33. There are two responses to his submissions. First, "[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower* v. *Glover*, 467 U. S., at 922–923. When, as here, the prosecutorial function is not within the advocate's role and there is no historical tradition of immunity on which we can draw, our inquiry is at an end. Second, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns* v. *Reed*, 500 U. S., at 486–487. Even if policy considerations allowed us to carve out new absolute immunities to liability for constitutional wrongs under § 1983, we see little reason to suppose that qualified immunity would provide adequate protection to prosecutors in their provision of legal advice to the police, see *id.*, at 494–496, yet would fail to provide sufficient protection in the present context.[9]

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[9] The Circuits other than the Seventh Circuit that have addressed this issue have applied only qualified immunity to press statements, see, *e. g.*, *Powers* v. *Coe*, 728 F. 2d 97, 103 (CA2 1984); *Marrero* v. *Hialeah*, 625 F. 2d 499, 506–507 (CA5 1980), cert. denied, 450 U. S. 913 (1981); *Gobel* v. *Mari-*

V

In his complaint, petitioner also charged that the prosecutors violated his rights under the Due Process Clause through extraction of statements implicating him by coercing two witnesses and paying them money. App. 9–11, 19. The precise contours of these claims are unclear, and they were not addressed below; we leave them to be passed on in the first instance by the Court of Appeals on remand.

As we have stated, *supra*, at 261, 264, 265, n. 2, petitioner does not challenge many aspects of the Court of Appeals' decision, and we have not reviewed them; they remain undisturbed by this opinion. As to the two challenged rulings on absolute immunity, however, the judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

As the Court observes, respondents have not demonstrated that the function either of fabricating evidence during the preliminary investigation of a crime, or of making out-of-court statements to the press, was protected by a well-established common-law privilege in 1871, when § 1983 was enacted. See *ante*, at 275, 277. It follows that respondents' alleged performance of such acts is not absolutely

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copa County, 867 F. 2d 1201, 1205 (CA9 1989); *England* v. *Hendricks*, 880 F. 2d 281, 285 (CA10 1989), cert. denied, 493 U. S. 1078 (1990); *Marx* v. *Gumbinner*, 855 F. 2d 783, 791 (CA11 1988); cf. *Rose* v. *Bartle*, 871 F. 2d 331, 345–346 (CA3 1989), yet Fitzsimmons has not suggested that prosecutors in those Circuits have been unduly constrained in keeping the public informed of pending criminal prosecutions. We also do not perceive why anything except a firm common-law rule should entitle a prosecutor to absolute immunity for his statements to the press when nonprosecutors who make similar statements, for instance, an attorney general's press spokesperson or a police officer announcing the return of an indictment, receive only qualified immunity.

immune from suit under § 1983, since "the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute." *Burns* v. *Reed*, 500 U. S. 478, 498 (1991) (SCALIA, J., concurring in judgment in part and dissenting in part); accord, *ante*, at 267–269. The policy reasons for extending protection to such conduct may seem persuasive, see *post*, at 283–286 (KENNEDY, J., concurring in part and dissenting in part), but we simply "do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy," *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984). This is therefore an easy case, in my view, and I have no difficulty joining the Court's judgment.

I join the Court's opinion as well, though I have some reservation about the historical authenticity of the "principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity," *ante*, at 273. By the early years of this century, there was some authority for the proposition that the traditional defamation immunity extends to "act[s] incidental to the proper initiation" or pursuit of a judicial proceeding, such as "[s]tatements made by counsel to proposed witnesses," Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 489, and n. 82 (1909). See, *e. g.*, G. Bower, Actionable Defamation 103–105, and n. *h* (1908); *Youmans* v. *Smith*, 153 N. Y. 214, 47 N. E. 265 (1897). I have not found any previous expression of such a principle, but accede to the Court's judgment that it existed several decades earlier, when § 1983 was enacted, at least in the sense that it could be logically derived from then-existing decisions, cf. *Burns*, *supra*, at 505 (SCALIA, J., concurring in judgment in part and dissenting in part). In future cases, I trust the Court (aided by briefing on the point) will look to history to determine more precisely the outlines of this principle. It is certainly

in accord with the principle to say that prosecutors cannot "properly claim to be acting as advocates" *before* they have "probable cause to have anyone arrested," *ante*, at 274, 275—but reference to the common-law cases will be indispensable to show when they can properly claim to be acting "as advocates" *after* that point, though not yet "during the course of judicial proceedings," *ante*, at 277.

I believe, moreover, that the vagueness of the "acting-as-advocate" principle may be less troublesome in practice than it seems in theory, for two reasons. First, the Court reaffirms that the defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871. See *ante*, at 269, 275, 277–278. Thus, if application of the principle is unclear, the defendant simply loses. Second, many claims directed at prosecutors, of the sort that are based on acts not plainly covered by the conventional malicious-prosecution and defamation privileges, are probably not actionable under § 1983, and so may be dismissed at the pleading stage without regard to immunity—undermining the dissent's assertion that we have converted absolute prosecutorial immunity into "little more than a pleading rule," *post*, at 283. I think petitioner's false-evidence claims in the present case illustrate this point. Insofar as they are based on respondents' supposed knowing *use* of fabricated evidence before the grand jury and at trial, see *ante*, at 267, n. 3—acts which might state a claim for denial of due process, see, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935) *(per curiam)*—the traditional defamation immunity provides complete protection from suit under § 1983. If "reframe[d] . . . to attack the preparation" of that evidence, *post*, at 283, the claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution. See *Buckley* v. *Fitzsimmons*, 919

F. 2d 1230, 1244 (CA7 1990), vacated and remanded, 502 U. S. 801 (1991).

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SOUTER join, concurring in part and dissenting in part.

I agree there is no absolute immunity for statements made during a press conference. But I am unable to agree with the Court's conclusion that respondents are not entitled to absolute immunity on petitioner's claim that they conspired to manufacture false evidence linking petitioner to the bootprint found on the front door of Jeanine Nicarico's home. I join Parts I, II, III, and IV–B of the Court's opinion, but dissent from Part IV–A.

I

As the Court is correct to observe, the rules determining whether particular actions of government officials are entitled to immunity have their origin in historical practice and have resulted in a functional approach. *Ante*, at 267–268. See also *Burns* v. *Reed*, 500 U. S. 478, 484–486 (1991); *Forrester* v. *White*, 484 U. S. 219, 224 (1988); *Malley* v. *Briggs*, 475 U. S. 335, 342–343 (1986); *Cleavinger* v. *Saxner*, 474 U. S. 193, 201 (1985); *Briscoe* v. *LaHue*, 460 U. S. 325, 342 (1983); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 810 (1982); *Butz* v. *Economou*, 438 U. S. 478, 511–513 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409, 420–425 (1976). I share the Court's unwillingness to accept Buckley's argument "that *Imbler*'s protection for a prosecutor's conduct 'in initiating a prosecution and in presenting the State's case,' 424 U. S., at 431, extends only to the act of initiation itself and to conduct occurring in the courtroom." *Ante*, at 272. In *Imbler*, we acknowledged that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and we explained that these actions of the prosecutor, undertaken in

his functional role as an advocate, were entitled to absolute immunity, 424 U. S., at 431, n. 33. See *ante*, at 269–270.

There is a reason even more fundamental than that stated by the Court for rejecting Buckley's argument that *Imbler* applies only to the commencement of a prosecution and to in-court conduct. This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule. Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves. *Imbler* v. *Pachtman*, *supra*, at 431, n. 34. Cf. *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 503–507 (1975). Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that we found necessary in *Imbler* and would discourage trial preparation by prosecutors. In this way, Buckley's proffered standard would have the perverse effect of encouraging, rather than penalizing, carelessness, cf. *Forrester* v. *White*, *supra*, at 223, and it would discourage early participation by prosecutors in the criminal justice process.

Applying these principles to the case before us, I believe that the conduct relating to the expert witnesses falls on the absolute immunity side of the divide. As we recognized in *Imbler* and *Burns*, and do recognize again today, the functional approach does not dictate that all actions of a prosecutor are accorded absolute immunity. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the

one and not the other.'" *Ante*, at 273, quoting *Hampton* v. *Chicago*, 484 F. 2d 602, 608 (CA7 1973), cert. denied, 415 U. S. 917 (1974). Nonetheless, while Buckley labels the prosecutors' actions relating to the bootprint experts as "investigative," I believe it is more accurate to describe the prosecutors' conduct as preparation for trial. A prosecutor must consult with a potential trial witness before he places the witness on the stand, and if the witness is a critical one, consultation may be necessary even before the decision whether to indict. It was obvious from the outset that the bootprint was critical to the prosecution's case, and the prosecutors' consultation with experts is best viewed as a step to ensure the bootprint's admission in evidence and to bolster its probative value in the eyes of the jury.

Just as *Imbler* requires that the decision to use a witness must be insulated from liability, 424 U. S., at 426, it requires as well that the steps leading to that decision must be free of the distortive effects of potential liability, at least to the extent that the prosecutor is engaged in trial preparation. Actions in "obtaining, reviewing, and evaluating" witness testimony, *id.*, at 431, n. 33, are a classic function of the prosecutor as advocate. Pretrial and even preindictment consultation can be "intimately associated with the judicial phase of the criminal process," *id.*, at 430. Potential liability premised on the prosecutor's early consultation would have "an adverse effect upon the functioning of the criminal justice system," *id.*, at 426. Concern about potential liability arising from pretrial consultation with a witness might "hampe[r]" a prosecutor's exercise of his judgment as to whether a certain witness should be used. *Id.*, at 426, and n. 24. The prospect of liability may "induc[e] [a prosecutor] to act with an excess of caution or otherwise to skew [his] decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide [his] conduct." *Forrester* v. *White*, *supra*, at 223. Moreover, "[e]xposing the prosecutor to liability for the initial phase of

his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability." *Malley* v. *Briggs*, 475 U. S., at 343. That distortion would frustrate the objective of accuracy in the determination of guilt or innocence. See *Imbler* v. *Pachtman*, *supra*, at 426.

Furthermore, the very matter the prosecutors were considering, the decision to use particular expert testimony, was "subjected to the 'crucible of the judicial process.'" *Burns* v. *Reed*, 500 U. S., at 496, quoting *Imbler* v. *Pachtman*, *supra*, at 440 (WHITE, J., concurring in judgment). Indeed, it appears that the only constitutional violations these actions are alleged to have caused occurred within the judicial process. The question Buckley presented in his petition for certiorari itself makes this point: "Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of and participation in a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?" Pet. for Cert. i. Remedies other than prosecutorial liability, for example, a pretrial ruling of inadmissibility or a rejection by the trier of fact, are more than adequate "to prevent abuses of authority by prosecutors." *Burns* v. *Reed*, *supra*, at 496. See also *Butz* v. *Economou*, 438 U. S., at 512; *Imbler* v. *Pachtman*, *supra*, at 429.

Our holding in *Burns* v. *Reed*, *supra*, is not to the contrary. There we cautioned that prosecutors were not entitled to absolute immunity for "every litigation-inducing conduct," *id.*, at 494, or for every action that "could be said to be in some way related to the ultimate decision whether to prosecute," *id.*, at 495. The premise of *Burns* was that, in providing advice to the police, the prosecutor acted to guide the police, not to prepare his own case. See *id.*, at 482 (noting that the police officers sought the prosecutor's advice first to find out whether hypnosis was "an unacceptable investiga-

tive technique" and later to determine whether there was a basis to "plac[e] [a suspect] under arrest"). In those circumstances, we found an insufficient link to the judicial process to warrant absolute immunity. But the situation here is quite different. For the reasons already explained, subjecting a prosecutor's pretrial or preindictment witness consultation and preparation to damages actions would frustrate and impede the judicial process, the result *Imbler* is designed to avoid.

II

The Court reaches a contrary conclusion on the issue of the bootprint evidence by superimposing a bright-line standard onto the functional approach that has guided our past decisions. According to the Court, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Ante*, at 274. To allow otherwise, the Court tells us, would create an anomalous situation whereby prosecutors are granted only qualified immunity when offering legal advice to the police regarding an unarrested suspect, see *Burns, supra*, at 492–496, but are endowed with absolute immunity when conducting their own legal work regarding an unarrested suspect. *Ante*, at 275–276.

I suggest that it is the Court's probable-cause demarcation between when conduct can be considered absolutely immune advocacy and when it cannot that creates the true anomaly in this case. We were quite clear in *Imbler* that if absolute immunity for prosecutors meant anything, it meant that prosecutors were not subject to suit for malicious prosecution. 424 U. S., at 421–422, 424, 428. See also *Burns, supra*, at 493 ("[T]he common-law immunity from malicious prosecution . . . formed the basis for the decision in *Imbler*"). Yet the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and *without probable cause*. See *Wyatt* v. *Cole*, 504 U. S. 158, 165 (1992); *id.*, at 170 (KENNEDY, J., concurring); *id.*, at 177

(REHNQUIST, C. J., dissenting); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119 (5th ed. 1984). If the Court means to withhold absolute immunity whenever it is alleged that the injurious actions of a prosecutor occurred before he had probable cause to believe a specified individual committed a crime, then no longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution. I find it rather strange that the classic case for the invocation of absolute immunity falls on the unprotected side of the Court's new dividing line. I also find it hard to accept any line that can be so easily manipulated by criminal defendants turned civil plaintiffs, allowing them to avoid a dismissal on absolute immunity grounds by throwing in an allegation that a prosecutor acted without probable cause. See *supra*, at 283.

Perhaps the Court means to draw its line at the point where an appropriate neutral third party, in this case the Illinois special grand jury, makes a determination of probable cause. This line, too, would generate anomalous results. To begin, it could have the perverse effect of encouraging prosecutors to seek indictments as early as possible in an attempt to shelter themselves from liability, even in cases where they would otherwise prefer to wait on seeking an indictment to ensure that they do not accuse an innocent person. Given the stigma and emotional trauma attendant to an indictment and arrest, promoting premature indictments and arrests is not a laudable accomplishment.

Even assuming these premature actions would not be induced by the Court's rule, separating absolute immunity from qualified immunity based on a third-party determination of probable cause makes little sense when a civil plaintiff claims that a prosecutor falsified evidence or coerced confessions. If the false evidence or coerced confession served as the basis for the third party's determination of probable

cause, as was alleged here, it is difficult to fathom why securing such a fraudulent determination transmogrifies unprotected conduct into protected conduct. Finally, the Court does not question our conclusion in *Burns* that absolute immunity attached to a prosecutor's conduct before a grand jury because it "'perform[s] a judicial function.'" 500 U. S., at 490, quoting W. Prosser, Law of Torts § 94, pp. 826–827 (1941). See also *Yaselli* v. *Goff*, 12 F. 2d 396 (CA2 1926), aff'd, 275 U. S. 503 (1927). It is unclear to me, then, why preparing for grand jury proceedings, which obviously occur before an indictment is handed down, cannot be "intimately associated with the judicial phase of the criminal process" and subject to absolute immunity. *Burns*, *supra*, at 492, quoting *Imbler*, *supra*, at 430.

As troubling as is the line drawn by the Court, I find the reasons for its line-drawing to be of equal concern. The Court advances two reasons for distinguishing between pre-probable-cause and post-probable-cause activity by prosecutors. First, the distinction is needed to ensure that prosecutors receive no greater protection than do police officers when engaged in identical conduct. *Ante*, at 276. Second, absent some clear distinction between investigation and advocacy, the Court fears, "every prosecutor might . . . shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Ibid.* This step, it is alleged, would enable any prosecutor to "retrospectively describ[e]" his investigative work "as 'preparation' for a possible trial" and therefore request the benefits of absolute immunity. *Ibid.* I find neither of these justifications persuasive.

The Court's first concern, I take it, is meant to be a restatement of one of the unquestioned goals of our § 1983 immunity jurisprudence: ensuring parity in treatment among state actors engaged in identical functions. *Forrester* v. *White*, 484 U. S., at 229; *Cleavinger* v. *Saxner*, 474 U. S., at

201. But it was for the precise reason of advancing this goal that we adopted the functional approach to absolute immunity in the first place, and I do not see a need to augment that approach by developing bright-line rules in cases where determining whether different actors are engaged in identical functions involves careful attention to subtle details. The Court, moreover, perceives a danger of disparate treatment because it assumes that before establishing probable cause, police and prosecutors perform the same functions. *Ante*, at 276. This assumption seem to me unwarranted. I do not understand the art of advocacy to have an inherent temporal limitation, so I cannot say that prosecutors are never functioning as advocates before the determination of probable cause. More to the point, the Court's assumption further presumes that when both prosecutors and police officers engage in the same conduct, they are of necessity engaged in the same function. With this I must disagree. Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same but the functions distinct. See Buchanan, Police-Prosecutor Teams, 23 The Prosecutor 32 (summer 1989).

Advancing to the second reason provided for the Court's line-drawing, I think the Court overstates the danger of allowing pre-probable-cause conduct to constitute advocacy entitled to absolute immunity. I agree with the Court that the institution of a prosecution "does not retroactively transform . . . work from the administrative into the prosecutorial," *ante*, at 276, but declining to institute a prosecution

likewise should not "retroactively transform" work from the prosecutorial into the administrative. Cf. *Imbler*, 424 U. S., at 431, n. 33 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution . . . . These include questions of whether to present a case to a grand jury, whether to file an information, [and] whether and when to prosecute"). In either case, the primary question, one which I have confidence the federal courts are able to answer with some accuracy, is whether a prosecutor was acting as an advocate, an investigator, or an administrator when he took the actions called into question in a subsequent § 1983 action. As long as federal courts center their attention on this question, a concern that prosecutors can disguise their investigative and administrative actions as early forms of advocacy seems to be unfounded.

III

In recognizing a distinction between advocacy and investigation, the functional approach requires the drawing of difficult and subtle distinctions, and I understand the necessity for a workable standard in this area. But the rule the Court adopts has created more problems than it has solved. For example, even after there is probable cause to arrest a suspect or after a suspect is indicted, a prosecutor might act to further police investigative work, say by finding new leads, in which case only qualified immunity should apply. The converse is also true: Even before investigators are satisfied that probable cause exists or before an indictment is secured, a prosecutor might begin preparations to present testimony before a grand jury or at trial, to which absolute immunity must apply. In this case, respondents functioned as advocates, preparing for prosecution before investigators are alleged to have amassed probable cause and before an indictment was deemed appropriate. In my judgment

respondents are entitled to absolute immunity for their involvement with the expert witnesses in this case. With respect, I dissent from that part of the Court's decision reversing the Court of Appeals judgment of absolute immunity for respondents' conduct in relation to the bootprint evidence.

Syllabus

SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* SCHAEFER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–311. Argued March 31, 1993—Decided June 24, 1993

In 1986, respondent Schaefer filed a claim for Social Security disability benefits, which was denied by petitioner Secretary at the administrative level. Schaefer sought judicial review and, on April 4, 1989, the District Court reversed the administrative denial of benefits and remanded the case to the Secretary pursuant to the fourth sentence of 42 U. S. C. § 405(g). Schaefer was awarded benefits on remand and, in July 1990, he returned to the District Court and filed for attorney's fees under the Equal Access to Justice Act (EAJA). In opposing the motion, the Secretary noted that the EAJA required Schaefer to file his application within 30 days of "final judgment" in the action, 28 U. S. C. § 2412(d)(1)(B), and argued that the 30-day clock began running when the District Court's sentence-four remand order of April 4, 1989, became final, which would have occurred at the end of the 60 days for appeal provided under Federal Rule of Appellate Procedure 4(a). The District Court awarded fees to Schaefer, holding that a sentence-four remand order is not a final judgment where a court retains jurisdiction and plans to enter a judgment after remand proceedings are complete. The Court of Appeals affirmed on the same basis.

Held:

1. The 30-day period for filing an application for EAJA fees begins immediately upon expiration of the time for appeal of a "sentence-four remand order." Pp. 295–302.

(a) A district court remanding a case pursuant to sentence four of § 405(g) must enter judgment in the case and may not retain jurisdiction over the administrative proceedings on remand. Sentence four's plain language authorizes a court to enter a judgment "with or without remanding the cause for a rehearing," not a remand order "with or without" a judgment. Pp. 295–297.

(b) The Court's decision in *Sullivan* v. *Hudson*, 490 U. S. 877, 892—that fees incurred during administrative proceedings held pursuant to a district court's remand order may be recovered under the EAJA—does not apply where the remand is ordered pursuant to sentence four of § 405(g). Pp. 298–300.

(c) Contrary to dicta in *Sullivan* v. *Hudson*, a Social Security claimant who obtains a sentence-four judgment reversing the Secretary's denial of benefits meets the description of a "prevailing party" set out in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 791–792. Pp. 300–302.

2. Schaefer's application for EAJA fees was nonetheless timely under § 2412(d)(1) because the District Court failed to comply with Federal Rule of Civil Procedure 58 in entering its sentence-four remand order of April 4, 1989. The EAJA's 30-day time limit runs from the *end* of the period for appeal, and that period does not begin until a judgment is entered in compliance with the formalities of Rule 58. Because the District Court never entered formal judgment, neither the time for appeal nor the EAJA's 30-day clock had run when Schaefer filed his application. Pp. 302–303.

960 F. 2d 1053, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 303.

William K. Kelley argued the cause *pro hac vice* for petitioner. On the briefs were *Solicitor General Starr, Acting Solicitor General Bryson, Assistant Attorney General Gerson, Deputy Solicitor General Mahoney, Edwin S. Kneedler,* and *William Kanter.*

Randall J. Fuller argued the cause for respondent. With him on the brief were *Brian Wolfman* and *David C. Vladeck.**

JUSTICE SCALIA delivered the opinion of the Court.

This case concerns the proper timing of an application for attorney's fees under the Equal Access to Justice Act (EAJA) in a Social Security case. Under 42 U. S. C. § 405(g), a claimant has the right to seek judicial review of a final

*Briefs of *amici curiae* urging affirmance were filed for Legal Services of Northern California, Inc., et al. by *Gary F. Smith* and *Gill Deford;* and for the National Organization of Social Security Claimants' Representatives by *Nancy G. Shor* and *Kirk B. Roose.*

decision of the Secretary of Health and Human Services denying Social Security benefits. One possible outcome of such a suit is that the district court, pursuant to sentence four of § 405(g), will enter "a judgment . . . reversing the decision of the Secretary . . . [and] remanding the cause for a rehearing." The issue here is whether the 30-day period for filing an application for EAJA fees begins immediately upon expiration of the time for appeal of such a "sentence-four remand order," or sometime after the administrative proceedings on remand are complete.

I

In 1986, respondent Richard Schaefer filed an application for disability benefits under Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.* (1988 ed. and Supp. III). He was denied benefits at the administrative level, and sought judicial review by filing suit against the Secretary as authorized by § 405(g). Schaefer and the Secretary filed cross-motions for summary judgment. On April 4, 1989, the District Court held that the Secretary had committed three errors in ruling on Schaefer's case and entered an order stating that "the Secretary's decision denying disability insurance benefits to [Schaefer] is reversed, that the parties' cross-motions for summary judgment are denied, and that the case is remanded to the Secretary for further consideration in light of this Order." App. to Pet. for Cert. 27a.

In accordance with this order, Schaefer's application for benefits was reconsidered at the administrative level, and was granted. On July 18, 1990, Schaefer returned to the District Court and filed an application for attorney's fees pursuant to EAJA. In response, the Secretary noted that Schaefer was required to file any application for EAJA fees "within thirty days of final judgment in the action," 28 U. S. C. § 2412(d)(1)(B), and argued that the relevant "final judgment" in the case was the administrative decision on

remand, which had become final on April 2, 1990. The District Court stayed action on Schaefer's EAJA application pending this Court's imminent ruling in *Melkonyan* v. *Sullivan*, 501 U. S. 89 (1991).

Melkonyan was announced shortly thereafter, holding that a final administrative decision could not constitute a "final judgment" for purposes of §2412(d)(1)(B). *Id.*, at 96. In light of *Melkonyan*, the Secretary changed positions to argue that EAJA's 30-day clock began running when the District Court's April 4, 1989 order (not the administrative ruling on remand) became final, which would have occurred at the end of the 60 days for appeal provided under Federal Rule of Appellate Procedure 4(a). Thus, the Secretary concluded, Schaefer's time to file his EAJA application expired on July 3, 1989, over a year before the application was filed. The District Court, however, found Schaefer's EAJA application timely under the controlling Circuit precedent of *Welter* v. *Sullivan*, 941 F. 2d 674 (CA8 1991), which held that a sentence-four remand order is not a final judgment where "the district court retain[s] jurisdiction . . . and plan[s] to enter dispositive sentence four judgmen[t]" after the administrative proceedings on remand are complete. *Id.*, at 675. The District Court went on to rule that Schaefer was entitled to $1,372.50 in attorney's fees.

The Secretary fared no better on appeal. The Eighth Circuit declined the Secretary's suggestion for en banc reconsideration of *Welter*, and affirmed the District Court in an unpublished *per curiam* opinion. Judgt. order reported at 960 F. 2d 1053 (1992). The Secretary filed a petition for certiorari, urging us to reverse the Court of Appeals summarily. We granted certiorari, 506 U. S. 997 (1992), and set the case for oral argument.

II

The first sentence of 28 U. S. C. §2412(d)(1)(B) provides:

> "A party seeking an award of fees and other expenses shall, *within thirty days of final judgment in the action*,

> submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." (Emphasis added.)

In *Melkonyan* v. *Sullivan*, we held that the term "final judgment" in the highlighted phrase above "refers to judgments entered *by a court of law*, and does not encompass decisions rendered by an administrative agency." See 501 U. S., at 96. Thus, the only order in this case that could have resulted in the starting of EAJA's 30-day clock was the District Court's April 4, 1989, order, which reversed the Secretary's decision denying disability benefits and remanded the case to the Secretary for further proceedings.

In cases reviewing final agency decisions on Social Security benefits, the exclusive methods by which district courts may remand to the Secretary are set forth in sentence four and sentence six of § 405(g), which are set forth in the margin.[1] See *Melkonyan*, *supra*, at 99–100. Schaefer correctly

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[1] Sentences four and six of 42 U. S. C. § 405(g) provide:

"[4] The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. . . . [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a tran-

concedes that the District Court's remand order in this case was entered pursuant to sentence four.[2] He argues, however, that a district court proceeding under that provision need not enter a judgment at the time of remand, but may postpone it and retain jurisdiction pending completion of the administrative proceedings. That argument, however, is inconsistent with the plain language of sentence four, which authorizes a district court to enter a judgment "with or without" a remand order, not a remand order "with or without" a judgment. See *Sullivan* v. *Finkelstein*, 496 U. S. 617, 629 (1990). Immediate entry of judgment (as opposed to entry of judgment after postremand agency proceedings have been completed and their results filed with the court) is in fact the principal feature that distinguishes a sentence-four remand from a sentence-six remand. See *Melkonyan*, *supra*, at 101–102.

Nor is it possible to argue that the judgment authorized by sentence four, if it includes a remand, does not become a "final judgment"—as required by § 2412(d)—upon expiration of the time for appeal. If that were true, there would never be any final judgment in cases reversed and remanded for further agency proceedings (including those which suffer that fate after the Secretary has filed the results of a sentence-six remand). Sentence eight of § 405(g) states that "[t]he judgment of the court"—which must be a reference to a sentence-four judgment, since that is the *only* judgment authorized by § 405(g)—"shall be final except that it shall be

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script of the additional record and testimony upon which his action in modifying or affirming was based."

[2] Sentence-six remands may be ordered in only two situations: where the Secretary requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency. See § 405(g) (sentence six); *Melkonyan* v. *Sullivan*, 501 U. S. 89, 99–100, and n. 2 (1991); cf. *Sullivan* v. *Finkelstein*, 496 U. S. 617, 626 (1990). The District Court's April 4, 1989, remand order clearly does not fit within either situation.

subject to review in the same manner as a judgment in other civil actions." Thus, when the time for seeking appellate review has run, the sentence-four judgment fits squarely within the term "final judgment" as used in § 2412(d), which is defined to mean "a judgment that is final and not appealable." 28 U. S. C. § 2412(d)(2)(G). We described the law with complete accuracy in *Melkonyan*, when we said:

> "In sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable. . . . In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs." 501 U. S., at 102.

Schaefer raises two arguments that merit further discussion. The first is based on our decision in *Sullivan* v. *Hudson*, 490 U. S. 877, 892 (1989), which held that fees incurred during administrative proceedings held pursuant to a district court's remand order could be recovered under EAJA. In order "to effectuate *Hudson*," Schaefer contends, a district court entering a sentence-four remand order may properly hold its judgment in abeyance (and thereby delay the start of EAJA's 30-day clock) until postremand administrative proceedings are complete; otherwise, as far as fees incurred during the yet-to-be-held administrative proceedings are concerned, the claimant would be unable to comply with the requirement of § 2412(d)(1)(B) that the fee application include "the amount sought" and "an itemized statement . . . [of] the actual time expended" by attorneys and experts. In response, the Secretary argues that *Hudson* applies only to cases remanded pursuant to sentence six of § 405(g), where there is no final judgment and the clock does not begin to run. The difficulty with that, Schaefer contends, is that *Hudson itself* clearly involved a sentence-four remand.

On the last point, Schaefer is right. Given the facts recited by the Court in *Hudson*, the remand order there could have been authorized only under sentence four. See 490 U. S., at 880–881; cf. n. 2, *supra*. However, the facts in *Hudson* also show that the District Court had not terminated the case, but had retained jurisdiction during the remand. And that was a central element in our decision, as the penultimate sentence of the opinion shows:

> "We conclude that where a court orders a remand to the Secretary in a benefits litigation *and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlement to benefits*, the proceedings on remand are an integral part of the 'civil action' for judicial review, and thus attorney's fees for representation on remand are available subject to the other limitations in the EAJA." 490 U. S., at 892 (emphasis added).

We have since made clear, in *Finkelstein*, that that retention of jurisdiction, that failure to terminate the case, was error: Under § 405(g), "each final decision of the Secretary [is] reviewable by a *separate* piece of litigation," and a sentence-four remand order "*terminate[s]* the civil action" seeking judicial review of the Secretary's final decision. 496 U. S., at 624–625 (emphases added). What we adjudicated in *Hudson*, in other words, was a hybrid: a sentence-four remand that the District Court had improperly (but without objection) treated like a sentence-six remand.[3] We specifically

[3] The Secretary not only failed to object to the District Court's retention of jurisdiction, but affirmatively endorsed the practice as a means of accommodating the lower court cases holding that a § 405(g) plaintiff does not become a prevailing party until Social Security benefits are actually awarded. Reply Brief for Petitioner in *Sullivan* v. *Hudson*, O. T. 1988, No. 616, pp. 12–13. Those precedents were highly favorable to the Government, of course, because they relieved the Secretary of liability for EAJA fees in all cases where Social Security benefits were ultimately denied. But they were also at war with the view—expressed later in the

noted in *Melkonyan* that *Hudson* was limited to a "narrow class of qualifying administrative proceedings" where "the district court retains jurisdiction of the civil action" pending the completion of the administrative proceedings. 501 U. S., at 97. We therefore do not consider the holding of *Hudson* binding as to sentence-four remands that are ordered (as they should be) without retention of jurisdiction, or that are ordered with retention of jurisdiction that is challenged.[4]

Schaefer's second argument is that a sentence-four remand order cannot be considered a "final judgment" for purposes of § 2412(d)(1)(B) because that provision requires the party seeking fees to submit an application "show[ing] that [he] is a prevailing party." That showing, Schaefer contends, cannot be made until the proceedings on remand are complete, since a Social Security claimant does not "prevail" until he is awarded Social Security benefits. The premise of this argument is wrong. No holding of this Court has ever denied prevailing-party status (under § 2412(d)(1)(B)) to a plaintiff who won a remand order pursuant to sentence four of § 405(g). Dicta in *Hudson* stated that "a Social Security

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Secretary's *Hudson* reply brief—that a sentence-four remand order is a "final judgment" in the civil action. *Id.*, at 16. Essentially, the Secretary in *Hudson* wanted it both ways: He wanted us to regard retention of jurisdiction as proper for purposes of determining prevailing-party status, but as improper for purposes of awarding fees on remand.

[4] JUSTICE STEVENS says that our holding "overrul[es]" *Sullivan* v. *Hudson*, 490 U. S. 877 (1989). *Post*, at 304, 311. We do not think that is an accurate characterization. *Hudson* remains good law as applied to remands ordered pursuant to sentence six. And since the distinction between sentence-four and sentence-six remands was neither properly presented nor considered in *Hudson*, see *supra*, at 299, and n. 3, and *infra* this page and 301, limiting *Hudson* to sentence-six cases does not "overrule" the decision even in part. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 631 (1993). We agree with JUSTICE STEVENS that until today there has been some contradiction in our case law on this subject. In resolving it, however, we have not simply chosen *Melkonyan*'s dicta over *Hudson*, but have grounded our decision in the text and structure of the relevant statutes, particularly § 405.

claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings." 490 U. S., at 887. But that statement (like the holding of the case) simply failed to recognize the distinction between a sentence-four remand, which terminates the litigation with victory for the plaintiff, and a sentence-six remand, which does not. The sharp distinction between the two types of remand had not been made in the lower court opinions in *Hudson*, see *Hudson* v. *Secretary of Health and Human Services*, 839 F. 2d 1453 (CA11 1988); App. to Pet. for Cert. in *Sullivan* v. *Hudson*, O. T. 1988, No. 616, pp. 17a–20a (setting forth unpublished District Court opinion), was not included in the question presented for decision,[5] and was mentioned for the first time in the closing pages of the Secretary's reply brief, see Reply Brief for Petitioner in *Sullivan* v. *Hudson*, O. T. 1988, No. 616, pp. 14–17. It is only decisions after *Hudson*—specifically *Finkelstein* and *Melkonyan*—which establish that the sentence-four, sentence-six distinction is crucial to the structure of judicial review established under § 405(g). See *Finkelstein*, 496 U. S., at 626; *Melkonyan*, 501 U. S., at 97–98.

Hudson's dicta that remand does not generally confer prevailing-party status relied on three cases, none of which supports that proposition as applied to sentence-four remands. *Hanrahan* v. *Hampton*, 446 U. S. 754, 758–759 (1980), rejected an assertion of prevailing-party status, not by virtue of having secured a remand, but by virtue of having obtained a favorable procedural ruling (the reversal on appeal of a directed verdict) during the course of the judicial proceedings. *Hewitt* v. *Helms*, 482 U. S. 755 (1987), held

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[5] As formulated in the Secretary's petition, the question on which the Court granted certiorari in *Hudson* was: "Whether Social Security administrative proceedings conducted after a remand from the courts are 'adversary adjudications' for which attorney fees are available under the [EAJA]." Pet. for Cert. in *Sullivan* v. *Hudson*, O. T. 1988, No. 616, p. I.

that a plaintiff does not become a prevailing party merely by obtaining "a favorable judicial statement of law in the course of litigation that results in *judgment against the plaintiff*," *id.*, at 763 (emphasis added). (A sentence-four remand, of course, is a judgment *for* the plaintiff.) And the third case cited in *Hudson, Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), affirmatively supports the proposition that a party who wins a sentence-four remand order is a prevailing party. *Garland* held that status to have been obtained "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Id.*, at 791–792 (citation and internal quotation marks omitted). Obtaining a sentence-four judgment reversing the Secretary's denial of benefits certainly meets this description. See also *Farrar* v. *Hobby*, 506 U. S. 103 (1992).

III

Finally, Schaefer argues that, even if the District Court *should have* entered judgment in connection with its April 4, 1989 order remanding the case to the Secretary, the fact remains that it did not. And since no judgment was entered, he contends, the 30-day time period for filing an application for EAJA fees cannot have run. We agree.

An EAJA application may be filed until 30 days after a judgment becomes "not appealable"—*i. e.*, 30 days after the time for appeal has ended. See §§ 2412(d)(1)(B), (d)(2)(G); see also *Melkonyan*, 501 U. S., at 102. Rule 4(a) of the Federal Rules of Appellate Procedure establishes that, in a civil case to which a federal officer is a party, the time for appeal does not end until 60 days after "entry of judgment," and that a judgment is considered entered for purposes of the Rule only if it has been "entered in compliance with Rul[e] 58 . . . of the Federal Rules of Civil Procedure." Fed. Rules App. Proc. 4(a)(1), (7). Rule 58, in turn, requires a district court to set forth every judgment "on a separate document" and provides that "[a] judgment is effective only when so set

forth." See *United States* v. *Indrelunas*, 411 U. S. 216, 220 (1973) *(per curiam)*.

Since the District Court's April 4 remand order was a final judgment, see *supra*, at 299, a "separate document" of judgment should have been entered. It is clear from the record that this was not done. The Secretary does not dispute that, but argues that a formal "separate document" of judgment is not needed for an order of a district court to *become* appealable. That is quite true, see 28 U. S. C. § 1291; *Bankers Trust Co.* v. *Mallis*, 435 U. S. 381 (1978) *(per curiam)*; *Finkelstein*, *supra*, at 628, n. 7, but also quite irrelevant. EAJA's 30-day time limit runs from the *end* of the period for appeal, not the *beginning*. Absent a formal judgment, the District Court's April 4 order remained "appealable" at the time that Schaefer filed his application for EAJA fees, and thus the application was timely under § 2412(d)(1).[6]

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

In *Sullivan* v. *Hudson*, 490 U. S. 877 (1989), a case, like this one, in which a federal court reversed the Secretary of

[6] We disagree with JUSTICE STEVENS' assertion that "the respondent has prevailed precisely *because* the District Court in this case did enter a remand order without entering a judgment." *Post*, at 305, n. 2 (emphasis in original). By entering a sentence-four remand order, the District Court did enter a *judgment;* it just failed to comply with the formalities of Rule 58 in doing so. That was error but, as detailed in the text, the relevant rules and statutes impose the burden of that error on the party seeking to assert an untimeliness defense, here the Secretary. Thus, contrary to JUSTICE STEVENS' suggestion, see *ibid.*, our ruling in favor of respondent is not at all inconsistent with the proposition that sentence four and sentence six provide the exclusive methods by which district courts may remand a § 405 case to the Secretary.

Health and Human Services' claims determination and remanded the case to the Social Security Administration (Agency) for reconsideration (a so-called "sentence-four" remand), we held that claimants who are otherwise eligible for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U. S. C. §2412(d), are entitled to reimbursement for fees incurred on remand. In so holding, it was our understanding, consistent with "prevailing party" jurisprudence in other areas of the law, 490 U. S., at 886–887, that "[n]o fee award at all would have been available to [the claimant] absent successful conclusion of the remand proceedings," *id.*, at 889.

Two Terms later, in *Melkonyan* v. *Sullivan*, 501 U. S. 89 (1991), we stated in dicta that in sentence-four remand cases, the 30-day period in which claimants must submit their EAJA fee applications begins to run when the district court issues its remand order. *Id.*, at 101–102. That statement was in obvious tension with the holding of *Hudson;* for it makes little sense to start the 30-day EAJA clock running before a claimant even knows whether he or she will be a "prevailing party" under EAJA by securing benefits on remand.

The question presented in this case is how best to reconcile this tension in our cases. If we reject the Government's rather bizarre proposal of requiring *all* Social Security claimants who achieve a sentence-four remand to file a protective EAJA application within 30 days of the remand order, and then update or amend their applications if they are successful on remand, see Brief for Petitioner 26–30, we are left with essentially two alternatives. We can overrule *Hudson* and endorse *Melkonyan*'s dicta that the 30-day clock under EAJA begins to run once the district court issues a sentence-four remand order. That is the path followed by the majority. Alternatively, we can repudiate the dicta in *Melkonyan* and reaffirm the understanding of EAJA that we had at the time we decided *Hudson:* that fees are avail-

able for services rendered on remand before the Agency, and the 30-day EAJA clock begins to run when the district court enters a final, dispositive judgment for EAJA purposes once the proceedings on remand have been completed. That is the path followed by the Court of Appeals in this case and several Courts of Appeals that have struggled with the tension between *Hudson* and *Melkonyan*.[1] Because that approach accords with a proper understanding of the purposes underlying EAJA and, in my view, common sense, I would affirm not only the judgment of the Court of Appeals, but its reasoning as well.

The major premise underlying the Court's contrary decision today is that there is sharp distinction, for purposes of EAJA, between remands ordered pursuant to sentence four and sentence six of 42 U. S. C. § 405(g).[2] Legal expenses incurred in a "sentence-six" remand may be recoverable under EAJA, the Court suggests, whereas such expenses incurred in a sentence-four remand, the far more common of the two, are most definitely not recoverable. *Ante*, at 298–300. While this dichotomy has the superficial appeal of purporting to "harmoniz[e] the remand provisions of § 405(g) with the EAJA requirement that a 'final judgment' be entered in the civil action in order to trigger the EAJA filing period," *Mel-*

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[1] See, *e. g.*, *Hafner* v. *Sullivan*, 972 F. 2d 249, 252 (CA8 1992); *Labrie* v. *Secretary of Health and Human Services*, 976 F. 2d 779, 785 (CA1 1992); *Gutierrez* v. *Sullivan*, 953 F. 2d 579, 584 (CA10 1992).

[2] See *ante*, at 296–297, n. 1. The Court reasons that remands can be ordered only pursuant to sentence six or sentence four, and that Congress left no room for hybrids or for cases that did not fit neatly into either category. Thus, referring to "the plain language of sentence four," *ante*, at 297, the Court assumes that the sentence "authorizes a district court to enter a judgment 'with or without' a remand order, not a remand order 'with or without' a judgment," *ibid.* Ironically, when we come to the end of the Court's opinion, we learn that the respondent has prevailed precisely *because* the District Court in this case did enter a remand order without entering a judgment.

konyan, 501 U. S., at 102,[3] it directly contradicts, in my view, the admonition repeated in our cases that "the language of [EAJA] must be construed with reference to the purpose of . . . EAJA and the realities of litigation against the Government." *Sullivan* v. *Finkelstein*, 496 U. S. 617, 630 (1990). See also *Sullivan* v. *Hudson*, 490 U. S., at 889–890.

As explained above, our decision in *Hudson* was based in part on the premise that prevailing party status for purposes of EAJA could not be determined until after proceedings on remand were completed. I find unpersuasive the Court's attempt to distinguish cases relied upon in *Hudson* that we previously characterized as "for all intents and purposes identical." *Id.*, at 886; see *ante*, at 301–302.[4] Nevertheless,

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[3] The EAJA, 28 U. S. C. § 2412, provides in relevant part:

"(d)(1)(A) [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought . . . . The party shall also allege that the position of the United States was not substantially justified."

[4] As we explained in *Hudson:*

"[I]n a case such as this one, where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party' status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceedings is known. The situation is for all intents and purposes identical to that we addressed in *Hanrahan* v. *Hampton*, 446 U. S. 754 (1980). There we held that the reversal of a directed verdict for defendants on appeal did not render the plaintiffs in that action 'prevailing parties' such that an interim award of attorney's fees would be justified under 42 U. S. C. § 1988. We found that such 'procedural or evidentiary rulings' were not themselves 'matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under

the Court's holding today that a claimant who secures nothing more than an order instructing the Secretary to try again is a "prevailing party" does undermine one premise of our decision in *Hudson*. It is, however, only one premise. *Hudson* stood on broader grounds, and I continue to believe that our opinion in that case correctly explained why legal services performed in agency proceedings on remand are properly within the coverage of EAJA:

> "We think the principles we found persuasive in [*Pennsylvania* v.] *Delaware Valley* [*Citizens' Council*, 478 U. S. 546 (1986),] and [*New York Gaslight Club, Inc.* v.] *Carey*[, 447 U. S. 54 (1980),] are controlling here. As in *Delaware Valley*, the administrative proceedings on remand in this case were 'crucial to the vindication of [respondent's] rights.' *Delaware Valley*, *supra*, at 561. . . . [T]he services of an attorney may be necessary both to ensure compliance with the District Court's order in the administrative proceedings themselves, and to prepare for any further proceedings before the District Court to verify such compliance. In addition, as we did in *Carey*, we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate. Given the 'mandatory' nature of the administrative proceedings at issue here, and their

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§ 1988.' *Id.*, at 759. More recently in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), we indicated that in order to be considered a prevailing party, a plaintiff must achieve some of the benefit sought in bringing the action. *Id.*, at 791–793. We think it clear that under these principles a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings. See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987). Indeed, the vast majority of the Courts of Appeals have come to this conclusion. See, *e. g.*, *Paulson* v. *Bowen*, 836 F. 2d 1249, 1252 (CA9 1988); *Swedberg* v. *Bowen*, 804 F. 2d 432, 434 (CA8 1986); *Brown* v. *Secretary of Health and Human Services*, [747 F. 2d 878, 880–881 (CA3 1984)]." *Hudson*, 490 U. S., at 886–887.

close relation in law and fact to the issues before the District Court on judicial review, we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short. Indeed, the incentive which such a system would create for attorneys to abandon claimants after judicial remand runs directly counter to long established ethical canons of the legal profession. See American Bar Association, Model Rules of Professional Conduct, Rule 1.16, pp. 53–55 (1984). Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 418–419 (1978). Since the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a part, and the EAJA allows 'any court having jurisdiction of that action' to award fees, 28 U. S. C. § 2412(d)(1)(A), we think the statute, read in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, governmental action,' 94 Stat. 2325, permits a court to award fees for services performed on remand before the Social Security Administration." 490 U. S., at 889–890.

Hudson was not based on a distinction between a remand ordered pursuant to sentence four and one ordered pursuant to sentence six of § 405(g), and it was not based solely on our understanding of "prevailing party" jurisprudence in other areas of the law. It was based also on the commonsense conclusion that allowing for the recovery of legal fees incurred on remand before the Agency was necessary to effectuate the purposes underlying EAJA, and that permitting the awarding of such fees accorded with Congress' intent in passing that statute.

That sound and eminently reasonable conclusion was not undermined by our decision in *Sullivan* v. *Finkelstein*, 496

U. S. 617 (1990), the case that first drew the distinction between sentence-four and sentence-six remands. To be sure, there is language in *Finkelstein* that supports the Court's conclusion today that a final judgment must accompany a sentence-four remand order and that such a judgment starts the 30-day clock for filing a fee application under EAJA. But *Finkelstein*, unlike *Hudson*, was not a case interpreting EAJA. The question presented was whether the District Court order invalidating Agency regulations as inconsistent with the Social Security Act was a "final decision" within the meaning of 28 U. S. C. § 1291 and thus subject to immediate appeal by the Secretary. In holding that it was, we were careful to note that the issue presented was "appealability," not "the proper time period for filing a petition for attorney's fees under EAJA." 496 U. S., at 628–629, n. 8. More directly, we expressly declined respondent's invitation to import into our analysis of appealability under § 1291 our reasoning and analysis of the EAJA in *Hudson*. See 496 U. S., at 630.

In *Melkonyan*, we changed course. The distinction that we had drawn between the question of appealability under § 1291 and eligibility for fees under EAJA was blurred; in *Melkonyan*, we imported wholecloth our analysis from *Finkelstein*, which, again, concerned § 1291, into our analysis of when the 30-day limitations period for filing an EAJA fee application began to run. It was in that case that we first crafted the rigid distinction between a sentence-four remand and a sentence-six remand *for purposes of EAJA*, and stated in dicta that the "final judgment in the action" referred to in § 2412(d)(1)(B) of EAJA was the judgment entered concomitantly with a sentence-four remand order.

In my opinion, we should abandon that dicta. While the distinction between a sentence-four and a sentence-six remand may have some force for purposes of appealability, it is a distinction without a difference when viewed, as it should be, "with reference to the purpose of the EAJA and

the realities of litigation against the Government." *Finkelstein*, 496 U. S., at 630. Regardless of whether the remand is ordered pursuant to sentence four or sentence six, the claimant will be dependent on the lawyer's services on remand in order to secure the benefits to which he or she may be entitled. If anything, recovery of fees in cases remanded pursuant to sentence four is more important for purposes of effectuating the goals of EAJA than the recovery of fees in sentence-six cases. As we explained in *Finkelstein*, a sentence-six remand frequently occurs because the claimant seeks to present new evidence of which neither the Agency nor the claimant was aware at the time the Secretary's benefits determination was made. *Id.*, at 626. Thus, in many sentence-six cases the added expenses incurred by the claimant on remand cannot be attributed to any wrongful or unjustified decisions by the Secretary. That is not the case, of course, with a sentence-four remand; a court's order to remand a case pursuant to sentence four of § 405(g) necessarily means that the Secretary has committed legal error. The claimant is sent back to the administrative proceedings, with all the expenses incurred therein, *precisely because* of decisions made by the Secretary. For the reasons we articulated in *Hudson*, fees incurred under these circumstances should be covered under EAJA.

Claimants have 30 days from "final judgment in the action" to file an application for fees. 28 U. S. C. § 2412(d)(1)(B). In *Hudson*, the Government conceded that the "final judgment" referred to in § 2412(d)(1)(B) was a judgment entered in the district court *after* the proceedings on remand were completed. *Hudson*, 490 U. S., at 887. In my view, nothing in *Finkelstein*, a case interpreting a different statute, undermined that commonsense understanding of the procedural steps that must be taken to become eligible for a fee award: (1) secure a remand order; (2) prevail on remand; and (3) have an appropriate judgment entered. I would therefore disavow the dicta in *Melkonyan* and hold, as did the court

below and the Courts of Appeals for two other Federal Circuits,[5] that

> "[w]hen a judicial remand order in Social Security disability cases contemplates additional administrative proceedings that will determine the merits of the claimant's application for benefits, and thus will determine whether the claimant is a prevailing party, the district court retains discretion to enter a final judgment for EAJA purposes after the proceedings on remand have been completed." *Hafner* v. *Sullivan*, 972 F. 2d 249, 252 (CA8 1992).

Thus, while I agree with the Court's judgment in this case, I respectfully disagree with its decision to overrule *Sullivan* v. *Hudson*.

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[5] See n. 1, *supra*.

Syllabus

HELLER, SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES *v.* DOE, BY HIS MOTHER AND NEXT FRIEND, DOE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 92–351. Argued March 22, 1993—Decided June 24, 1993

Kentucky permits the involuntary commitment of mentally retarded or mentally ill individuals who present a threat of danger to themselves, family, or others, who can reasonably benefit from the available treatment, and for whom the least restrictive alternative is placement in the relevant facility. However, the statutory procedures for the commitment of the two groups differ in the two respects at issue here. First, the applicable burden of proof in mental retardation commitment proceedings is clear and convincing evidence while the standard in mental illness proceedings is beyond a reasonable doubt. Second, guardians and immediate family members of the subject of a mental retardation proceeding may participate as if parties to those proceedings, with all attendant rights. In this action, respondents, a class of involuntarily committed mentally retarded persons, claimed that the distinctions are irrational and therefore violate the Fourteenth Amendment's Equal Protection Clause, and that granting close family members and guardians the status of parties violates the Due Process Clause. The District Court granted them summary judgment, and the Court of Appeals affirmed.

Held:

1. Respondents' claim that the statutes should be reviewed under a heightened scrutiny standard is not properly presented, since it was not raised below and the lower courts ruled only on the ground of rational-basis review. Pp. 318–319.

2. The distinctions between the two proceedings are consistent with the Equal Protection Clause. Pp. 319–330.

(a) Classifications neither involving fundamental rights nor proceeding along suspect lines do not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and a legitimate governmental purpose. A legislature need not articulate its rationale, and a State need not produce evidence to sustain the classification's rationality. Moreover, courts are compelled to accept a legislature's generalization even when there is an imperfect fit between means and ends. Pp. 319–321.

Syllabus

(b) Kentucky has proffered more than adequate justifications for its burden of proof scheme. Mental retardation, which is a developmental disability usually well documented throughout childhood, is easier to diagnose than is mental illness, which may have a sudden onset in adulthood. Thus, it could have assigned a higher burden of proof to mental illness to equalize the risk of erroneous determination that the subject of a commitment proceeding has the condition in question. Ease of diagnosis could also result in a more accurate dangerousness determination for the mentally retarded, who have a relatively static condition and a well-documented record of previous behavior. In contrast, since manifestations of mental illness may be sudden, past behavior may not be an adequate predictor of future actions. A higher standard for the mentally ill is also justified on the ground that, in general, their treatment is much more intrusive than that received by the mentally retarded. Pp. 321–328.

(c) There is also a rational basis for Kentucky to allow immediate family members and guardians to participate as parties in proceedings to commit the mentally retarded but not the mentally ill. Kentucky could rationally conclude that close relatives and guardians may have intimate knowledge of the subject's abilities and experiences which provides valuable insights that should be considered during the involuntary commitment process. By contrast, mental illness may arise only after minority, when the afflicted person's immediate family members have ceased to provide care and support, and the proper course of treatment may depend on matters not related to observations made in a household setting. In addition, adults previously of sound mental health who are diagnosed as mentally ill may have a need for privacy that justifies confining a commitment proceeding to the smallest group possible. Whether Kentucky could have chosen a less-restrictive means than party status for achieving its legislative end is irrelevant in rational-basis review. Pp. 328–330.

3. Allowing close relatives and legal guardians to participate as parties does not violate due process. Consideration of the factors set out in *Mathews* v. *Eldridge*, 424 U. S. 319, 335—the private interest that will be affected, the risk of an erroneous deprivation of such interest, and the government's interest—compels this conclusion. Rather than increasing the risk of an erroneous deprivation, allowing close relatives and guardians to participate as parties actually increases a proceeding's accuracy by putting valuable information before the court. It also implements the State's interest in providing family members a voice in such proceedings. And even if they favor commitment, their participation does not undermine the interest of the individual facing commitment. The only individual interest that is protected by the

Due Process Clause is in an accurate decision, not a favorable one. Pp. 330–333.

965 F. 2d 109, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 334. BLACKMUN, J., filed a dissenting opinion, *post*, p. 334. SOUTER, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, and in Part II of which O'CONNOR, J., joined, *post*, p. 335.

William K. Moore argued the cause for petitioner. With him on the briefs were *Edward D. Klatte* and *Charles P. Lawrence*.

Kelly Miller argued the cause for respondents. With her on the brief was *Brian Wolfman*.*

JUSTICE KENNEDY delivered the opinion of the Court.

In the Commonwealth of Kentucky, involuntary civil commitments of those alleged to be mentally retarded and of those alleged to be mentally ill are governed by separate statutory procedures. Two differences between these commitment proceedings are at issue in this case. First, at

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*Briefs of *amici curiae* urging reversal were filed for the State of New Jersey et al. by *Robert J. Del Tufo*, Attorney General, *Joseph L. Yannotti*, Assistant Attorney General, *Mary C. Jacobson*, Senior Deputy Attorney General, and *Sharon M. Hallanan*, Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *Linley E. Pearson* of Indiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Don Stenberg* of Nebraska, *Mark Barnett* of South Dakota, and *Mary Sue Terry* of Virginia; for Concerned Families of Hazelwood Center, ICR/MR, Inc., et al. by *Frank Coryell;* and for Voice of the Retarded et al. by *William F. Sherman*.

Briefs of *amici curiae* urging affirmance were filed for the American Association on Mental Retardation et al. by *James W. Ellis* and *Maureen A. Sanders;* and for Focus on Community Understanding and Services, Inc., et al. by *Ronald L. Smith* and *Michael Kirkman*.

John Townsend Rich, *Christopher E. Palmer*, and *Leonard S. Rubenstein* filed a brief for the Mental Health Law Project as *amicus curiae*.

a final commitment hearing, the applicable burden of proof for involuntary commitment based on mental retardation is clear and convincing evidence, Ky. Rev. Stat. Ann. § 202B.160(2) (Michie 1991), while the standard for involuntary commitment based on mental illness is beyond a reasonable doubt, § 202A.076(2). Second, in commitment proceedings for mental retardation, unlike for mental illness, "[g]uardians and immediate family members" of the subject of the proceedings "may participate . . . as if a party to the proceedings," with all attendant rights, including the right to present evidence and to appeal. § 202B.160(3). Respondents are a class of mentally retarded persons committed involuntarily to Kentucky institutions. They argue that these distinctions are irrational and violate the Equal Protection Clause of the Fourteenth Amendment. They claim also that granting close family members and guardians the status of parties violates the Due Process Clause. We reject these contentions and hold the Kentucky statutes constitutional.

I

This case has a long and complicated history. It began in 1982 when respondents filed suit against petitioner, the Kentucky Secretary of the Cabinet for Human Resources, claiming that Kentucky's failure to provide certain procedural protections before institutionalizing people on the basis of mental retardation violated the Constitution. Kentucky has amended its civil commitment statutes several times since 1982, with each new statute being attacked in court by respondents. As the previous incarnations of this lawsuit have little effect on the issues currently before this Court, we limit our discussion to the current round of the litigation. See *Doe* v. *Cowherd*, 770 F. Supp. 354, 355–356 (WD Ky. 1991) (recounting the procedural history).

At issue here are elements of Kentucky's statutory procedures, enacted in 1990, for the involuntary commitment of the mentally retarded. In many respects the procedures

governing commitment of the mentally retarded and the mentally ill are parallel. The statutes recognize a large class of persons who can petition for an individual's involuntary commitment, whether on grounds of mental retardation or mental illness. Ky. Rev. Stat. Ann. § 202B.100(3) (Michie 1991) (mental retardation); § 202A.051 (mental illness). Upon filing of the petition, the trial court must appoint counsel to represent the individual in question, unless he retains private counsel. § 202B.210 (mental retardation); § 202A.121 (mental illness). The trial court also must examine the person who filed the petition and, if there is probable cause to believe that the individual who is the subject of the petition should be involuntarily committed, the court must order his examination by two qualified professionals. §§ 202B.100(5), (6)(c) (mental retardation); §§ 202A.051(5), (6)(c) (mental illness). The subject of the proceeding has the right to retain a professional of his own choosing, who may "witness and participate in any examination" of him. § 202B.140 (mental retardation); § 202A.066 (mental illness). In cases of commitment for mental retardation, a professional retained by the subject's "parent or guardian" also must be permitted to witness and participate in any examination. § 202B.140.

If both qualified professionals certify that the individual meets the criteria for involuntary commitment, the trial court must conduct a preliminary hearing. § 202B.130 (mental retardation); § 202A.061 (mental illness). At the hearing, the court must receive as evidence the reports of these two professionals and any other professional retained under the statute. § 202B.160(1) (mental retardation); § 202A.076(1) (mental illness). The individual whose commitment is sought may testify and may call and cross-examine witnesses. § 202B.160(1) (mental retardation); § 202A.076(1) (mental illness). In cases of mental retardation, at both the preliminary hearing and, if there is one, the final hearing,

Kentucky law provides particular rights to guardians and immediate family members:

> "Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision." § 202B.160(3)

See also § 202B.230. If the trial court determines that there is probable cause to believe that the subject should be involuntarily committed, it proceeds to a final hearing. § 202B.100(8) (mental retardation); § 202A.051(9) (mental illness).

At the final hearing, the State, through the county attorney for the county in which the person subject to the proceeding lives, prosecutes the petition, § 202B.019 (mental retardation); § 202A.016 (mental illness); Tr. of Oral Arg. 33–35, and counsel for the person defends against institutionalization, *id.*, at 31, 34, 54. At this hearing, "[t]he manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding." § 202B.160(2) (mental retardation); § 202A.076(2) (mental illness). As in the preliminary hearing, the subject of the proceedings may testify and call and cross-examine witnesses. § 202B.160(2) (mental retardation); § 202A.076(2) (mental illness). In proceedings for commitment based on mental retardation, the standard of proof is clear and convincing evidence, § 202B.160(2); for mental illness, the standard is proof beyond a reasonable doubt, § 202A.076(2). For commitment of the mentally retarded, four propositions must be proved by clear and convincing evidence: "(1) The person is a mentally retarded person; (2) The person presents a danger or a threat of danger to self, family, or others; (3) The least restrictive alternative mode of treatment presently available requires placement in [a

residential treatment center]; and (4) Treatment that can reasonably benefit the person is available in [a residential treatment center]." § 202B.040. The criteria for commitment of the mentally ill are in substance identical, requiring proof beyond a reasonable doubt that an individual "is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available." § 202A.026. Appeals from involuntary commitment proceedings are taken in the same manner as other appeals from the trial court. § 202B.230 (mental retardation); § 202A.141 (mental illness).

After enactment of the 1990 modifications, respondents moved for summary judgment in their pending lawsuit against petitioner. They argued, among other things, that the differences in treatment between the mentally retarded and the mentally ill—the different standards of proof and the right of immediate family members and guardians to participate as parties in commitment proceedings for the mentally retarded but not the mentally ill—violated the Equal Protection Clause's prohibition of distinctions that lack a rational basis, and that participation by family members and guardians violated the Due Process Clause. The District Court for the Western District of Kentucky accepted these arguments and granted summary judgment to respondents on these and other grounds not at issue here, 770 F. Supp. 354 (1991), and the Court of Appeals for the Sixth Circuit affirmed, *Doe* v. *Cowherd*, 965 F. 2d 109 (1992). We granted Kentucky's petition for certiorari, 506 U. S. 939 (1992), and now reverse.

II

Respondents contend that, in evaluating the constitutionality of the distinctions drawn by Kentucky's statutes, we should apply not rational-basis review, but some form of

heightened scrutiny. Brief for Respondents 23–32. This claim is not properly presented. Respondents argued before the District Court and the Court of Appeals only that Kentucky's statutory scheme was subject to rational-basis review, and the courts below ruled on that ground. Indeed, respondents have conceded that they pressed their heightened scrutiny argument for the first time in their merits brief in this Court. *Id.*, at 23 ("[R]espondents did not argue this particular issue below . . ."). Even if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which, as noted below, see *infra*, at 320, does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation. See *Tennessee* v. *Dunlap*, 426 U. S. 312, 316, n. 3 (1976); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 215 (1976). We therefore decide this case as it has been presented to the courts whose judgments are being reviewed.

III

We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). See also, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471, 486 (1970). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) *(per curiam)*. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.

See, *e. g., Beach Communications, supra,* at 314–315; *Kadrmas* v. *Dickinson Public Schools,* 487 U. S. 450, 462 (1988); *Hodel* v. *Indiana,* 452 U. S. 314, 331–332 (1981); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 314 (1976) *(per curiam).* Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. See, *e. g., Nordlinger* v. *Hahn,* 505 U. S. 1, 11 (1992); *Dukes, supra,* at 303. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger, supra,* at 15. See also, *e. g., United States Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 179 (1980); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 528 (1959). Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, supra,* at 313. See also, *e. g., Nordlinger, supra,* at 11; *Sullivan* v. *Stroop,* 496 U. S. 478, 485 (1990); *Fritz, supra,* at 174–179; *Vance* v. *Bradley,* 440 U. S. 93, 111 (1979); *Dandridge* v. *Williams, supra,* at 484–485.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications, supra,* at 315. See also, *e. g., Vance* v. *Bradley, supra,* at 111; *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794, 812 (1976); *Locomotive Firemen* v. *Chicago, R. I. & P. R. Co.,* 393 U. S. 129, 139 (1968). A statute is presumed constitutional, see *supra,* at 319, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356, 364 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the

record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams, supra,* at 485, quoting *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70 (1913). See also, *e. g., Burlington Northern R. Co.* v. *Ford,* 504 U. S. 648, 651 (1992); *Vance* v. *Bradley, supra,* at 108, and n. 26; *New Orleans* v. *Dukes, supra,* at 303; *Schweiker* v. *Wilson,* 450 U. S. 221, 234 (1981). We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. See *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432 (1985); *Schweiker* v. *Wilson, supra.* In neither case did we purport to apply a different standard of rational-basis review from that just described.

True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation. That requirement is satisfied here. Kentucky has proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill.

A

Kentucky argues that a lower standard of proof in commitments for mental retardation follows from the fact that mental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before adulthood. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Dis-

orders 29 (3d rev. ed. 1987) (hereinafter Manual of Mental Disorders); American Assn. on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Support 5, 16–18 (9th ed. 1992) (hereinafter Mental Retardation); S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 16–17, 37 (3d ed. 1985) (hereinafter Mentally Disabled); Ky. Rev. Stat. Ann. § 202B.010(9) (Michie 1991). By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden and may not occur, or at least manifest itself, until adulthood. See, *e. g.*, Manual of Mental Disorders 190 (onset of schizophrenia may occur any time during adulthood); *id.*, at 220, 229 (onset of depression usually is during adulthood). Furthermore, as we recognized in an earlier case, diagnosis of mental illness is difficult. See *Addington* v. *Texas*, 441 U. S. 418, 430 (1979). See also Mentally Disabled 18. Kentucky's basic premise that mental retardation is easier to diagnose than is mental illness has a sufficient basis in fact. See, *e. g.*, *id.*, at 16; Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 438–439 (1985).

This difference between the two conditions justifies Kentucky's decision to assign a lower standard of proof in commitment proceedings involving the mentally retarded. In assigning the burden of proof, Kentucky was determining the "risk of error" faced by the subject of the proceedings. *Addington* v. *Texas*, *supra*, at 423. If diagnosis is more difficult in cases of mental illness than in instances of mental retardation, a higher burden of proof for the former tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question.[1] See G. Keppel, Design and Analysis 65–68 (1973).

[1] JUSTICE SOUTER suggests that this description of the function of burdens of proof is inconsistent with *Addington* v. *Texas*, 441 U. S. 418 (1979). See *post*, at 339–341 (dissenting opinion). His reasoning, however, would

From the diagnostic standpoint alone, Kentucky's differential burdens of proof (as well as the other statutory distinction at issue, see *infra*, at 328–329) are rational.

There is, moreover, a "reasonably conceivable state of facts," *Beach Communications*, 508 U. S., at 313, from which Kentucky could conclude that the second prerequisite to commitment—that "[t]he person presents a danger or a threat of danger to self, family, or others," Ky. Rev. Stat. Ann. § 202B.040 (Michie 1991)—is established more easily, as a general rule, in the case of the mentally retarded. Previous instances of violent behavior are an important indicator of future violent tendencies. See, *e. g.*, J. Monahan, The Clinical Prediction of Violent Behavior 71–72 (1981) (hereinafter Monahan); Kozol, Boucher, & Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371, 384 (1972). Mental retardation is a permanent, relatively static condition, see Mentally Disabled 37, so a determination of dangerousness may be made with some accuracy based on previous behavior. We deal here with adults only, so almost by definition in the case of the retarded there is an 18-year record upon which to rely.

This is not so with the mentally ill. Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties in-

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impose the due process conception of burdens of proof on a State's policy decision as to which standard is most appropriate in the circumstances. The Due Process Clause sets the minimum standard of proof required in particular contexts, based on consideration both of the respective interests of the State and individual and of the risk of erroneous decisions. *Addington, supra*, at 425. A State is free to adopt any burden of proof that meets or exceeds the constitutional minimum required by due process, and a State may select a standard of proof based on any rational policy of its choice. It may seek, as JUSTICE SOUTER would require, to balance the respective interests of the affected parties. See *post*, at 339. But it may also calibrate its standard of proof in an effort to establish the risk of error at a certain level.

herent in diagnosis of mental illness. Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1242–1243 (1974). It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate. See, *e. g.*, Steadman, Employing Psychiatric Predictions of Dangerous Behavior: Policy vs. Fact, in Dangerous Behavior: A Problem in Law and Mental Health 123, 125–128 (C. Frederick ed. 1978); Monahan 47–49. For these reasons, it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill.

A statutory classification fails rational-basis review only when it "'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), quoting *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). See also, *e. g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U. S. 802, 809 (1969); *Kotch* v. *Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U. S. 552, 556 (1947). Because ease of diagnosis is relevant to two of the four inquiries, it is not "wholly irrelevant" to the achievement of Kentucky's objective, and thus the statutory difference in the applicable burden of proof survives rational-basis review. In any event, it is plausible for Kentucky to have found that, for purposes of determining the acceptable risk of error, diagnosis and dangerousness are the most critical factors in the commitment decision, so the appropriate burden of proof should be tied to them.

There is a further, more far-reaching rationale justifying the different burdens of proof: The prevailing methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill. The mentally ill are subjected to medical and psychiatric treatment which may involve intrusive inquiries into the patient's innermost thoughts, see Meissner & Nicholi, The Psy-

chotherapies: Individual, Family, and Group, in The Harvard Guide to Modern Psychiatry 357–385 (A. Nicholi ed. 1978) (hereinafter Harvard Guide), and use of psychotropic drugs, see Baldessarini, Chemotherapy, in Harvard Guide 387–431; Berger, Medical Treatment of Mental Illness, 200 Science 974 (1978); Mentally Disabled 327–330; Brief for American Psychological Association as *Amicus Curiae* in *Washington* v. *Harper*, O. T. 1988, No. 88–599, pp. 10–11. By contrast, the mentally retarded in general are not subjected to these medical treatments. Rather, "'because mental retardation is . . . a learning disability and training impairment rather than an illness,'" *Youngberg* v. *Romeo*, 457 U. S. 307, 309, n. 1 (1982), quoting Brief for American Psychiatric Association as *Amicus Curiae* in *Youngberg* v. *Romeo*, O. T. 1981, No. 80–1429, p. 4, n. 1, the mentally retarded are provided "habilitation," which consists of education and training aimed at improving self-care and self-sufficiency skills. See *Youngberg, supra*, at 309, n. 1; M. Rosen, G. Clark, & M. Kivitz, Habilitation of the Handicapped 47–59 (1977); Mentally Disabled 332.

It is true that the loss of liberty following commitment for mental illness and mental retardation may be similar in many respects; but the different treatment to which a committed individual is subjected provides a rational basis for Kentucky to decide that a greater burden of proof is needed before a person may be committed for mental illness. The procedures required before the government acts often depend on the nature and extent of the burden or deprivation to be imposed. See *Addington* v. *Texas*, 441 U. S., at 423–424. For example, because confinement in prison is punitive and hence more onerous than confinement in a mental hospital, *id.*, at 428, the Due Process Clause subjects the former to proof beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970), whereas it requires in the latter case only clear and convincing evidence, *Addington* v. *Texas*, *supra*. It may also be true that some persons committed for mental retardation are subjected to more intrusive treatments while

confined. See *post*, at 342–346 (SOUTER, J., dissenting). Nonetheless, it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are committed receive treatment that is different from, and less invasive than, that to which the mentally ill are subjected. "States are not required to convince the courts of the correctness of their legislative judgments." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 464 (1981). Thus, since "'the question is at least debatable,'" *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 674 (1981), quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938), rational-basis review permits a legislature to use just this sort of generalization.

These distinctions may explain, too, the differences in treatment between the mentally retarded and the mentally ill that have long existed in Anglo-American law. At English common law there was a "marked distinction" in the treatment accorded "idiots" (the mentally retarded) and "lunatics" (the mentally ill). 1 F. Pollock & F. Maitland, The History of English Law 481 (2d ed. 1909) (hereinafter Pollack and Maitland). As Blackstone explained, a retarded person became a ward of the King, who had a duty to preserve the individual's estate and provide him with "necessaries," but the King could profit from the wardship. In contrast, the King was required to "provide for the custody and sustentation of [the mentally ill], and preserve their lands and the profits of them," but the King was prohibited from profiting thereby. 1 W. Blackstone, Commentaries *302–*304. See Pollack and Maitland 481; S. Herr, Rights and Advocacy for Retarded People 9–10 (1983).

Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis. That the law has long treated the classes as distinct, however, suggests that there is a commonsense distinction between the men-

tally retarded and the mentally ill. The differentiation continues to the present day. A large majority of States have separate involuntary commitment laws for the two groups,[2]

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[2] Ala. Code §22–52–50 *et seq.* (1990) (mental retardation); §22–52–1 *et seq.* (Supp. 1992) (mental illness); Alaska Stat. Ann. §47.30.700 *et seq.* (1990) (mental illness); Ariz. Rev. Stat. Ann. §36–533 *et seq.* (1986 and Supp. 1992) (mental illness); Ark. Code Ann. §20–48–404 (1991) (mental retardation); §20–47–207 (mental illness); Calif. Welf. & Inst. Code Ann. §6500 *et seq.* (West 1984 and Supp. 1993) (mental retardation); §5200 *et seq.* (mental illness); Colo. Rev. Stat. §27–10–105 *et seq.* (1989 and Supp. 1992) (mental illness); Conn. Gen. Stat. §17a–274 *et seq.* (1993) (mental retardation); §17a–495 *et seq.* (mental illness); Del. Code Ann., Tit. 16, §5522 (1983) (mental retardation); §5001 *et seq.* (1983 and Supp. 1992) (mental illness); D. C. Code Ann. §§6–1924, 6–1941 *et seq.* (1989) (mental retardation); §21–541 *et seq.* (mental illness); Fla. Stat. §393.11 *et seq.* (Supp. 1992) (mental retardation); §§394.463, 394.467 (1986 and Supp. 1992) (mental illness); Ga. Code Ann. §37–4–40 *et seq.* (Supp. 1992) (mental retardation); §37–3–40 *et seq.* (1982 and Supp. 1992) (mental illness); Haw. Rev. Stat. §334–60.2 *et seq.* (1985 and Supp. 1992) (mental illness); Idaho Code §66–406 (1989) (mental retardation); §66–329 (Supp. 1992) (mental illness); Ill. Rev. Stat., ch. 91½, ¶4–500 *et seq.* (1991) (mental retardation); ¶3–700 *et seq.* (mental illness); Ind. Code §12–26–7–1 *et seq.* (Burns 1992) (mental illness); Iowa Code §222.16 *et seq.* (1987) (mental retardation); §229.6 *et seq.* (mental illness); Kan. Stat. Ann. §59–2912 *et seq.* (1983 and Supp. 1990) (mental illness); Ky. Rev. Stat. Ann. §§202B.040, 202B.100 *et seq.* (Michie 1991) (mental retardation); §§202A.026, 202A.051 *et seq.* (mental illness); La. Rev. Stat. Ann. §28:404 (West 1989) (mental retardation); §28:54 *et seq.* (West 1989 and Supp. 1993) (mental illness); Me. Rev. Stat. Ann., Tit. 34–B, §5474 *et seq.* (1988) (mental retardation); §3864 (mental illness); Md. Health Code Ann. §7–502 *et seq.* (1990) (mental retardation); §10–613 *et seq.* (mental illness); Mass. Gen. Laws ch. 123, §5 *et seq.* (1989) (mental illness); Mich. Comp. Laws §330.1515 *et seq.* (1981) (mental retardation); §330.1434 *et seq.* (mental illness); Mo. Rev. Stat. §632.300 *et seq.* (1988) (mental illness); Mont. Code Ann. §53–20–121 *et seq.* (1991) (mental retardation); §53–21–121 *et seq.* (mental illness); Neb. Rev. Stat. §83–1020 *et seq.* (1987 and Supp. 1992) (mental illness); Nev. Rev. Stat. §435.123 *et seq.* (1991) (mental retardation); §433A.200 *et seq.* (mental illness); N. H. Rev. Stat. Ann. §171–A:10(II) (1990) (mental retardation); §135–C:34 *et seq.* (mental illness); N. J. Stat. Ann. §30:4–27.10 (West Supp. 1993) (mental illness); N. M. Stat. Ann. §43–1–13 (1989) (mental retardation); §43–1–10

and many States as well have separate agencies for addressing their needs.[3]

Kentucky's burden of proof scheme, then, can be explained by differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and by the nature of the treatment received after commitment. Each of these rationales, standing on its own, would suffice to establish a rational basis for the distinction in question.

B

There is a rational basis also for the other distinction challenged by respondents: that Kentucky allows close relatives

et seq. (mental illness); N. Y. Mental Hyg. Law § 15.27 *et seq.* (McKinney 1988) (mental retardation); § 9.27 *et seq.* (mental illness); N. D. Cent. Code § 25–03.1–07 *et seq.* (1989) (mental illness); Ohio Rev. Code Ann. § 5123.71 *et seq.* (1989 and Supp. 1992) (mental retardation); § 5122.11 *et seq.* (mental illness); Okla. Stat., Tit. 43A, § 5–401 (Supp. 1993) (mental illness); Ore. Rev. Stat. § 427.215 *et seq.* (1991) (mental retardation); § 426.070 *et seq.* (mental illness); Pa. Stat. Ann., Tit. 50, § 4406 (Purdon 1969 and Supp. 1992) (mental retardation); § 7301 *et seq.* (mental illness); R. I. Gen. Laws § 40.1–22–9 *et seq.* (1990) (mental retardation); § 40.1–5–8 (mental illness); S. C. Code Ann. § 44–20–450 (Supp. 1992) (mental retardation); § 44–17–510 *et seq.* (1985) (mental illness); S. D. Codified Laws § 27B–7–1 *et seq.* (1992) (mental retardation); § 27A–10–1 *et seq.* (mental illness); Tenn. Code Ann. § 33–6–103 *et seq.* (Supp. 1992) (mental illness); Tex. Health & Safety Code Ann. § 593.041 *et seq.* (1992) (mental retardation); § 574.001 *et seq.* (mental illness); Utah Code Ann. § 62A–5–312 (Supp. 1992) (mental retardation); § 62A–12–234 (mental illness); Vt. Stat. Ann., Tit. 18, § 8822 *et seq.* (1987) (mental retardation); § 7612 *et seq.* (mental illness); Va. Code Ann. § 37.1–67.1 *et seq.* (1984 and Supp. 1992) (mental illness); Wyo. Stat. § 25–5–119 (1990 and Supp. 1992) (mental retardation); § 25–10–110 (mental illness).

But see Minn. Stat. § 253B.07 *et seq.* (1992) (mental retardation and mental illness); Miss. Code Ann. § 41–21–61 *et seq.* (Supp. 1992) (mental retardation and mental illness); N. C. Gen. Stat. § 122C–261 *et seq.* (1989 and Supp. 1992) (mental retardation and mental illness); Wash. Rev. Code § 71.05.150 *et seq.* (1992 and Supp. 1993) (mental retardation and mental illness); W. Va. Code § 27–5–2 *et seq.* (1992) (mental retardation and mental illness); Wis. Stat. § 51.20 (1989–1990) (mental retardation and mental illness).

[3] See Brief for New Jersey et al. as *Amici Curiae* 7, 1a.

and guardians to participate as parties in proceedings to commit the mentally retarded but not the mentally ill. As we have noted, see *supra*, at 321–322, by definition, mental retardation has its onset during a person's developmental period. Mental retardation, furthermore, results in "deficits or impairments in adaptive functioning," that is to say, "the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility expected of his or her age by his or her cultural group." Manual of Mental Disorders 28–29. See also Mental Retardation 5–6, 15–16, 38–41. Based on these facts, Kentucky may have concluded that close relatives and guardians, both of whom likely have intimate knowledge of a mentally retarded person's abilities and experiences, have valuable insights that should be considered during the involuntary commitment process.

Mental illness, by contrast, may arise or manifest itself with suddenness only after minority, see *supra*, at 322, when the afflicted person's immediate family members have no knowledge of the medical condition and have long ceased to provide care and support. Further, determining the proper course of treatment may be far less dependent upon observations made in a household setting. Indeed, we have noted the severe difficulties inherent in psychiatric diagnosis conducted by experts in the field. *Addington* v. *Texas*, 441 U. S., at 430. See also Mentally Disabled 18. In addition, adults previously of sound mental health who are diagnosed as mentally ill may have a need for privacy that justifies the State in confining a commitment proceeding to the smallest group compatible with due process. Based on these facts, Kentucky may have concluded that participation as parties by relatives and guardians of the mentally ill would not in most cases have been of sufficient help to the trier of fact to justify the additional burden and complications of granting party status. To be sure, Kentucky could have provided rel-

atives and guardians of the mentally retarded some participation in commitment proceedings by methods short of providing them status as parties. That, however, is irrelevant in rational-basis review. We do not require Kentucky to have chosen the least restrictive means of achieving its legislative end. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 51 (1973). As long as Kentucky "rationally advances a reasonable and identifiable governmental objective, we must disregard" the existence of alternative methods of furthering the objective "that we, as individuals, perhaps would have preferred." *Schweiker* v. *Wilson*, 450 U. S., at 235.

IV

We turn now to respondents' claim that one aspect of the involuntary commitment procedures violates procedural due process. We note at the outset that respondents challenge as violative of due process only those provisions of Kentucky's comprehensive involuntary commitment procedures that allow participation in the proceedings by guardians and immediate family members. See Ky. Rev. Stat. Ann. §§ 202B.140, 202B.160(3), 202B.230 (Michie 1991). Respondents claim that by allowing the participation of persons whose interests may be adverse to those of the individual facing possible involuntary commitment, the statute "skews the balance" against the retarded individual and therefore imposes a burden on him. Brief for Respondents 32–36. Both courts below apparently accepted this argument, almost without explanation. See 965 F. 2d, at 113; 770 F. Supp., at 358. In our view, the claim is without merit.

We evaluate the sufficiency of this procedural rule under *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). There we held that determining the dictates of due process requires consideration of three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous depriva-

> tion of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

We think that application of the *Mathews* v. *Eldridge* factors compels the conclusion that participation as parties by close relatives and legal guardians is not a deprivation of due process. Even if parents, close family members, or legal guardians can be said in certain instances to have interests "adverse to [those of] the person facing commitment," 965 F. 2d, at 113, we simply do not understand how their participation as formal parties in the commitment proceedings increases "the risk of an erroneous deprivation," 424 U. S., at 335, of respondents' liberty interest. Rather, for the reasons explained, *supra*, at 329, these parties often will have valuable information that, if placed before the court, will increase the accuracy of the commitment decision. Kentucky law, moreover, does not allow intervention by persons who lack a personal stake in the outcome of the adjudication. Guardians have a legal obligation to further the interests of their wards, and parents and other close relatives of a mentally retarded person, after living with and caring for the individual for 18 years or more, have an interest in his welfare that the State may acknowledge. See *Parham* v. *J. R.*, 442 U. S. 584, 602–603 (1979). For example, parents who for 18 years or longer have cared for a retarded child can face changed circumstances resulting from their own advancing age, when the physical, emotional, and financial costs of caring for the adult child may become too burdensome for the child's best interests to be served by care in their home. There is no support whatever in our cases or our legal tradition for the "statist notion," *id.*, at 603, that the State's expertise and concern in these matters is so superior to that of parents and other close family members that the State must

slam the courthouse door against those interested enough to intervene. Finally, "the state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable . . . to care for themselves," as well as "authority under its police power to protect the community" from any dangerous mentally retarded persons. *Addington*, 441 U. S., at 426.

To be sure, if the additional parties involved in the proceedings favor commitment, their participation may increase the chances that the result of the proceeding will be a decision to commit. That fact, however, is beside the point. "The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to" the party challenging the existing procedures. *Medina* v. *California*, 505 U. S. 437, 451 (1992).

> "The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 13 (1979).

See also *Fuentes* v. *Shevin*, 407 U. S. 67, 97 (1972) (due process functions to "prevent unfair and mistaken deprivations"). At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him. So long as the accuracy of the adjudication is unaffected, therefore, the Due Process Clause does not prevent a State from allowing the intervention of immediate family members and legal guard-

ians, even if in some instances these parties will have interests adverse to those of the subject of the proceedings. Neither respondents nor their *amici* have suggested that accuracy would suffer from the intervention allowed by Kentucky law, and as noted above we think quite the opposite is true.

Because allowing guardians and immediate family members to participate as parties in commitment proceedings increases the accuracy of those proceedings and implements the State's interest in providing family members a voice in the proceedings, without undermining those interests of the individual protected by the Due Process Clause, these Kentucky statutes do not run afoul of due process. "We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution." *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U. S. 816, 855–856 (1977).

V

In sum, there are plausible rationales for each of the statutory distinctions challenged by respondents in this case. It could be that "[t]he assumptions underlying these rationales [are] erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge." *Beach Communications*, 508 U. S., at 320, quoting *Vance* v. *Bradley*, 440 U. S., at 112.[4]

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[4] Under a previous version of Kentucky's laws relating to the commitment of the mentally retarded, application by the parents or guardian of a mentally retarded person for placement in a mental retardation treatment center was treated as a voluntary commitment to which the procedural requirements of involuntary commitments were inapplicable. See Ky. Rev. Stat. Ann. §202B.040 (Michie 1982 and Supp. 1986). In a previous

The judgment of the Court of Appeals for the Sixth Circuit is

Reversed.

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

I agree with JUSTICE SOUTER that Kentucky's differential standard of proof for committing the mentally ill and the mentally retarded is irrational and therefore join Part II of his opinion. I conclude, however, that there is a rational basis for permitting close relatives and guardians to participate as parties in proceedings to commit the mentally retarded but not the mentally ill. As the Court points out, there are sufficiently plausible and legitimate reasons for the legislative determination in this area. I also agree with the Court that allowing guardians and immediate family members to participate as parties in commitment proceedings does not violate procedural due process. Like my colleagues, I would not reach the question whether heightened equal protection scrutiny should be applied to the Kentucky scheme.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE SOUTER's dissenting opinion, for I agree with him that this statute is not even rational. I write sepa-

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decision, the Court of Appeals held that persons committed upon application of parents or guardians must be considered to have been admitted involuntarily. *Doe* v. *Austin*, 848 F. 2d 1386, 1391–1392 (CA6 1988). We denied Kentucky's petition for certiorari from this decision, 488 U. S. 967 (1988), and Kentucky subsequently amended its statutes to remove this provision. In its brief, however, Kentucky again attacks this prior holding of the Court of Appeals. See Brief for Petitioner 20–28. Even were this issue not mooted by the repeal of the provision at issue, see, *e. g.*, *Department of Treasury* v. *Galioto*, 477 U. S. 556, 559–560 (1986); *Kremens* v. *Bartley*, 431 U. S. 119, 128–129 (1977), it is not "fairly included" within the questions on which we granted certiorari, this Court's Rule 14.1(a). See Pet. for Cert. i.

rately only to note my continuing adherence to the view that laws that discriminate against individuals with mental retardation, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 455 (1985) (opinion of Marshall, J., joined by Brennan and BLACKMUN, JJ.), or infringe upon fundamental rights, *Foucha* v. *Louisiana*, 504 U. S. 71, 84–86 (1992) (plurality opinion of WHITE, J., joined by BLACKMUN, STEVENS, and SOUTER, JJ.), are subject to heightened review.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, and with whom JUSTICE O'CONNOR joins as to Part II, dissenting.

Because I conclude that Kentucky's provision of different procedures for the institutionalization of the mentally retarded and the mentally ill is not supported by any rational justification, I respectfully dissent.

I

To begin with, the Court declines to address Doe's argument that we should employ strict or heightened scrutiny in assessing the disparity of treatment challenged here.[1]

[1] Doe relies, first, on the nature of the right at stake, citing our decision last Term in *Foucha* v. *Louisiana*, 504 U. S. 71 (1992). There we were faced with an equal protection challenge to a Louisiana statute authorizing continued commitment of currently sane insanity acquittees under standards that were not applied to criminal convicts who had completed their prison terms or were about to do so. The insanity acquittee was kept incarcerated in a mental institution unless he could prove he was not dangerous, see La. Code Crim. Proc. Ann., Art. 657 (West Supp. 1993), whereas "Louisiana law," as JUSTICE WHITE wrote, did "not provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious and large category of such persons .... However, state law does not allow for th[e] continuing confinement [of criminals who may be unable to prove they would not be dangerous] based merely on dangerousness. ... Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward,

While I may disagree with the Court's basis for its conclusion that this argument is not "properly presented," *ante*, at 319, I too would decline to address the contention that strict or heightened scrutiny applies. I conclude that the distinctions wrought by the Kentucky scheme cannot survive even that rational-basis scrutiny, requiring a rational relationship

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for such discrimination against insanity acquittees who are no longer mentally ill." *Foucha*, 504 U. S., at 85–86 (plurality opinion of WHITE, J., joined by BLACKMUN, STEVENS, and SOUTER, JJ.); see also *id.*, at 88 (O'CONNOR, J., concurring in part and concurring in judgment) ("Although I think it unnecessary to reach equal protection issues on the facts before us, the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question"). Because of the "'massive curtailment of liberty'" undoubtedly involved in involuntary civil commitment and institutionalization, see *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980) (quoting *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972)), Doe argues that heightened scrutiny applies under *Foucha* when those alleged to be mentally retarded are denied the protection afforded another "obvious and large category" of potential civil committees, those said to be mentally ill.

Doe also argues that the discrimination here has a second aspect that justifies application of strict or heightened scrutiny, in its classification on the basis of mental retardation. Although he recognizes that this Court held in 1985 that retarded individuals are not a quasi-suspect class, see *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 442–447 (1985), he argues that the subsequently enacted Americans With Disabilities Act of 1990 (ADA) amounts to an exercise of Congress's power under § 5 of the Fourteenth Amendment to secure the guarantees of the Equal Protection Clause to the disabled. See *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966). The ADA includes findings that people with disabilities (among whom are included those with mental impairments that Doe argues include mental retardation, see 42 U. S. C. § 12102(2)(A) (1988 ed., Supp. III)) "are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . ." § 12101(a)(7). Doe argues that this and other findings, together with expressions of purpose contained in the ADA, amount to a clear indication from Congress "that all individuals with disabilities, including individuals with mental retardation should be treated as a suspect class." Brief for Respondents 29–30.

between the disparity of treatment and some legitimate governmental purpose, which we have previously applied to a classification on the basis of mental disability, see *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 446–447 (1985), and therefore I need not reach the question of whether scrutiny more searching than *Cleburne*'s should be applied.[2] *Cleburne* was the most recent instance in which we addressed a classification on the basis of mental disability, as we did by enquiring into record support for the State's proffered justifications, and examining the distinction in treatment in light of the purposes put forward to support it. See *id.*, at 450. While the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is left uncertain. I would follow *Cleburne* here.

II

Obviously there are differences between mental retardation and mental illness. They are distinct conditions, they have different manifestations, they require different forms of care or treatment, and the course of each differs. It is without doubt permissible for the State to treat those who are mentally retarded differently in some respects from those who are mentally ill. The question here, however, is whether some difference between the two conditions ration-

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[2] This approach complies with "two of the cardinal rules governing the federal courts: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501 (1985) (citations, internal quotation marks, and brackets omitted), and is consistent with our past practice. See, *e. g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985) (declining to decide whether to apply heightened scrutiny where classification failed rational-basis test); cf. *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982) (declining to decide whether to apply strict scrutiny where classification could not survive heightened scrutiny).

ally can justify the particular disparate treatment accorded under this Kentucky statute.

The first distinction wrought by the statute is the imposition of a lesser standard of proof for involuntary institutionalization where the alleged basis of a need for confinement is mental retardation rather than mental illness. As the Court observes, four specific propositions must be proven before a person may be involuntarily institutionalized on the basis of mental retardation: "that: (1) [t]he person is a mentally retarded person; (2) [t]he person presents a danger or a threat of danger to self, family, or others; (3) [t]he least restrictive alternative mode of treatment presently available requires placement in [a state-run institution]; and (4) [t]reatment that can reasonably benefit the person is available in [a state-run institution]." Ky. Rev. Stat. Ann. §202B.040 (Michie 1991). At issue in this case is only the application of this provision to adults who have not been shown to be mentally retarded, but who are simply alleged to be. The subject of such a proceeding retains as full an interest in liberty as anyone else. The State of Kentucky has deemed this liberty interest so precious that, before one may be institutionalized on the basis of mental illness, the statutory prerequisites must be shown "beyond a reasonable doubt." §202A.076(2).[3] However, when the allegation against the individual is one of mental retardation, he is deprived of the protection of that high burden of proof. The first question here, then, is whether, in light of the State's decision to provide that high burden of proof in involuntary commitment

[3] As the Court notes, the statutory prerequisites are substantially identical for commitment on the basis of illness and retardation. Commitment on the ground of mental illness requires proof beyond a reasonable doubt that an individual "is a mentally ill person: (1) [w]ho presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) [w]ho can reasonably benefit from treatment; and (3) [f]or whom hospitalization is the least restrictive alternative mode of treatment presently available." Ky. Rev. Stat. Ann. §202A.026 (Michie 1991).

proceedings where illness is alleged, there is something about mental retardation that can rationally justify provision of less protection.

In upholding this disparate treatment, the Court relies first on the State's assertion that mental retardation is easier to diagnose than mental illness. It concludes that the discrimination in burdens of proof is rational because the lessened "'risk of error'" resulting from the higher burden of proof, see *ante*, at 322 (quoting *Addington* v. *Texas*, 441 U. S. 418, 423 (1979)), can be understood to offset a greater "ris[k] of an erroneous determination that the subject of a commitment proceeding has the condition in question" when the allegation is one of mental illness rather than mental retardation, *ante*, at 322. The Court reaches essentially the same conclusion with respect to the second prerequisite, that the individual present a danger or threat of danger to himself or others. See *ante*, at 324 (a determination of dangerousness may be made with "more accura[cy]" with respect to the mentally retarded than the mentally ill).

In concluding, however, that the demands of minimal rationality are satisfied if burdens of proof rise simply with difficulties of proof, the Court misunderstands the principal object in setting burdens. It is no coincidence that difficult issues in civil cases are not subject to proof beyond a reasonable doubt and that even the most garden variety elements in criminal cases are not to be satisfied by a preponderance of evidence. The reason for this is that burdens of proof are assigned and risks of error are allocated not to reflect the mere difficulty of avoiding error, but the importance of avoiding it as judged after a thorough consideration of those respective interests of the parties that will be affected by the allocation. See *Addington*, 441 U. S., at 425.

In a civil commitment proceeding, on the State's side of the balance, are the interests of protecting society from those posing dangers and protecting the ill or helpless individual from his own incapacities. *Id.*, at 426. On the other

side, it is clear that "[i]n cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty,'" *id.*, at 425 (brackets in original and citation omitted), which encompasses both freedom from restraint and freedom from the stigma that restraint and its justifications impose on an institutionalized person, *id.*, at 425–426.

The question whether a lower burden of proof is rationally justified, then, turns not only on whether ease of diagnosis and proof of dangerousness differ as between cases of illness and retardation, but also on whether there are differences in the respective interests of the public and the subjects of the commitment proceedings, such that the two groups subject to commitment can rationally be treated differently by imposing a lower standard of proof for commitment of the retarded.[4] The answer is clearly that they cannot. While difficulty of proof, and of interpretation of evidence, could legitimately counsel against setting the standard so high that the State may be unable to satisfy it (thereby effectively thwarting efforts to satisfy legitimate interests in protection, care, and treatment), see *id.*, at 429, that would at most justify a lower standard in the allegedly more difficult cases of illness, not in the easier cases of retardation. We do not lower burdens of proof merely because it is easy to prove the proposition at issue, nor do we raise them merely because it is difficult.[5] Nor do any other reasonably conceivable facts

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[4] In addition to the two prerequisites mentioned in the text, the State must also prove that commitment would be beneficial and the least restrictive alternative method of treatment. The Court does not contend that there is any rational justification for imposition of a lowered burden of proof with respect to these prerequisites for institutionalization in those cases where the allegation is one of retardation and not illness. See *ante*, at 324.

[5] And indeed, to the extent *Addington* v. *Texas*, 441 U. S. 418 (1979), does discuss the difficulty of diagnosing mental illness, see *id.*, at 429–430, it supports use only of a *lesser* standard of proof because of the practical problems created by a supposed "serious question as to whether a state

cut in favor of the distinction in treatment drawn by the Kentucky statute. Both the ill and the retarded may be dangerous, each may require care, and the State's interest is seemingly of equal strength in each category of cases. No one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded, and a mentally retarded person has as much to lose by civil commitment to an institution as a mentally ill counterpart, including loss of liberty to "choos[e] his own friends and companions, selec[t] daily activities, decid[e] what to eat, and retai[n] a level of personal privacy," among other things. Brief for American Association on Mental Retardation (AAMR) et al. as *Amici Curiae* 12 (AAMR Br.). We do not presume that a curtailment of the liberty of those who are disabled is, because of their disability, less severe than the same loss to those who are ill. Even if the individuals subject to involuntary commitment proceedings previously had been shown to be mentally retarded, they would thus still retain their "strong," legally cognizable interest in their liberty. Cf. *Foucha*, 504 U. S., at 88 (O'CONNOR, J., concurring in part and concurring in judgment). Even assuming, then, that the assertion of different degrees of difficulty of proof both of mental illness and mental retardation and of the dangerousness inherent in each condition is true (an assertion for which there is no support in the record), it lends not a shred of rational support to the decision to discriminate against the retarded in allocating the risk of erroneous curtailment of liberty.

The Court also rests its conclusion on the view that "it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are

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could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous," *id.*, at 429. Of course, in this case Kentucky has determined that the liberty of those alleged to be mentally ill is sufficiently precious that the State should assume the risk inherent in use of that higher standard.

committed receive treatment that is . . . less invasive tha[n] that to which the mentally ill are subjected." *Ante*, at 326. Nothing cited by the Court, however, demonstrates that such a belief would have been plausible for the Kentucky Legislature, nor does the Court's discussion render it plausible now. Cf. *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980) (under rational-basis scrutiny disparate treatment must be justified by "plausible reasons"). One example of the invasiveness to which the Court refers is the use of (and the results of the administration of) psychotropic drugs. I take no exception to the proposition that they are extensively used in treating mental illness. See *ante*, at 325 (citing authorities for the proposition that drugs are used in treating mental illness). Nor do I except to the proposition that the appropriate and perhaps characteristic response to mental retardation, but not to mental illness, is that kind of training in the necessities of self-sufficiency known as "habilitation." See *ibid.* (citing authorities describing such training).

Neither of these propositions tells us, however, that the same invasive mind-altering medication prescribed for mental illness is not also used in responding to mental retardation. And in fact, any apparent plausibility in the Court's suggestion that "the mentally retarded in general are not subjected to th[is] medical treatmen[t]," *ibid.*, dissipates the moment we examine readily available material on the subject, including studies of institutional practices affecting the retarded comparable to those studies concerning the treatment of mental illness cited by the Court. One recent examination of institutions for the mentally retarded in Kentucky's neighboring State of Missouri, for example, found that 76% of the institutionalized retarded receive some type of psychoactive drug and that fully 54% receive psychotropic drugs. See Intagliata & Rinck, Psychoactive Drug Use in Public and Community Residential Facilities for Mentally Retarded Persons, 21 Psychopharmacology Bull. 268, 272–

273 (1985). Another study, this one national in scope, found that 38% of the residents of institutions for the mentally retarded receive psychotropic drugs. See Hill, Balow, & Bruininks, A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People, 21 Psychopharmacology Bull. 279, 283 (1985). "Surveys conducted within institutions [for the mentally retarded] have generally shown prevalences in the range of 30% to 50% of residents receiving psychotropic drugs at any given time." Aman & Singh, Pharmacological Intervention, in Handbook of Mental Retardation 347, 348 (J. Matson & J. Mulick eds., 2d ed. 1991) (hereinafter Handbook of Mental Retardation).

Psychotropic drugs, according to the available material, are not only used to treat the institutionalized retarded, but are often misused. Indeed, the findings of fact by a United States District Court in North Carolina, another State nearby Kentucky, show that in three hospitals, 73% of persons committed as mentally retarded were receiving antipsychotic drugs. Less than half of these individuals had been diagnosed as mentally ill as well as mentally retarded following their commitment on the latter ground. See *Thomas S.* v. *Flaherty*, 699 F. Supp. 1178, 1187 (WDNC 1988), aff'd, 902 F. 2d 250 (CA4), cert. denied, 498 U. S. 951–952 (1990). The District Court found that the institutionalized retarded plaintiffs "have been seriously endangered and injured by the inappropriate use of antipsychotic drugs." *Flaherty*, *supra*, at 1186. See also *Halderman* v. *Pennhurst State School Hospital*, 446 F. Supp. 1295, 1307–1308 (ED Pa. 1977) (discussing evidence that 51% of the residents of a state institution for the mentally retarded received psychotropic drugs though less than one-third of those who received the drugs were monitored to determine the effectiveness of the treatment), aff'd, 612 F. 2d 84 (CA3 1979), rev'd on other grounds, 451 U. S. 1 (1981); Bates, Smeltzer, & Arnoczky, Appropriate and Inappropriate Use of Psychotherapeutic

Medications for Institutionalized Mentally Retarded Persons, 90 Am. J. Mental Deficiency 363 (1986) (finding that between 39% and 54% of medications prescribed to mentally retarded persons are inappropriate for the conditions diagnosed).

These facts are consistent with a law review study of drugs employed in treating retardation, which observed that the reduction in the need for institutional staff resulting from the use of sedating drugs has promoted drug use in responding to retardation despite "frightening adverse effects [including the suppression of] learning and intellectual development." Plotkin & Gill, Invisible Manacles: Drugging Mentally Retarded People, 31 Stan. L. Rev. 637, 638 (1979). There being nothing in the record to suggest that Kentucky's institutions are free from these practices, and no reason whatever to assume so, there simply is no plausible basis for the Court's assumption that the institutional response to mental retardation is in the main less intrusive in this way than treatment of mental illness.

The Court also suggests that medical treatment for the mentally retarded is less invasive than in the case of the mentally ill because the mentally ill are subjected to psychiatric treatment that may involve intrusive enquiries into the patient's innermost thoughts. See *ante*, at 324–325. Again, I do not disagree that the mentally ill are often subject to intrusive psychiatric therapy. But the mentally retarded too are subject to intrusive therapy, as the available material on the medical treatment of the mentally retarded demonstrates. The mentally retarded are often subjected to behavior modification therapy to correct, among other things, anxiety disorders, phobias, hyperactivity, and antisocial behavior, therapy that may include aversive conditioning as well as forced exposure to objects that trigger severe anxiety reactions. See McNally, Anxiety and Phobias, in Handbook of Mental Retardation 413–423; Mulick, Hammer, & Dura, Assessment and Management of Antisocial and Hyperactive Behavior, in

Handbook of Mental Retardation 397–412; Gardner, Use of Behavior Therapy with the Mentally Retarded, in Psychiatric Approaches to Mental Retardation 250–275 (F. Menolascino ed. 1970). Like drug therapy, psychiatric therapy for the mentally retarded can be, and has been, misused. In one recent case, a Federal District Court found that "aversive procedures [including seclusion and physical restraints were] being inappropriately used with no evidence for their effectiveness and no relationship between the choice of the procedure and the analysis of the cause of the problem[,] . . . plac[ing] clients at extreme risk for maltreatment." *Lelsz* v. *Kavanagh*, 673 F. Supp. 828, 850 (ND Tex.) (internal quotation marks and citation omitted), rev'd on unrelated grounds, 824 F. 2d 372 (CA5 1987). Invasive behavior therapy for the mentally retarded, finally, is often employed together with drug therapy. See McNally, *supra*, at 413–423; Mulick, Hammer, & Dura, *supra*, at 397–412.

The same sorts of published authorities on which the Court relies, in sum, refute the contention that "[t]he prevailing methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill." *Ante*, at 324.[6] The available literature indicates that psychotropic drugs and invasive therapy are routinely administered to the retarded as well as the mentally

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[6] I also see little point in the Court's excursion into the historical difference in treatment between so-called "idiots," and so-called "lunatics." See *ante*, at 326. Surely the Court does not intend to suggest that the irrational and scientifically unsupported beliefs of pre-19th-century England can support any distinction in treatment between the mentally ill and the mentally retarded today. At that time, "lunatics" were "[s]een as demonically possessed or the products of parental sin [and] were often punished or left to perish." See S. Herr, Rights and Advocacy for Retarded People 9 (1983). The primary purpose of an adjudication of "idiocy" appears to have been to "depriv[e] [an individual] of [his] property and its profits." *Id.*, at 10. Those without wealth "were dealt with like other destitute or vagrant persons through workhouses and houses of correction." *Id.*, at 11.

ill, and there are no apparent differences of therapeutic regimes that would plausibly explain less rigorous commitment standards for those alleged to be mentally retarded than for those alleged to be mentally ill.[7]

III

With respect to the involvement of family members and guardians in the commitment proceeding, the Court holds it to be justified by the fact that mental retardation "has its onset during a person's developmental period," while mental illness "may arise or manifest itself with suddenness only after minority." *Ante*, at 329. The Court suggests that a mentally ill person's parents may have "ceased to provide care and support" for him well before the onset of illness, whereas parents are more likely to have retained connection with a retarded son or daughter, whose "proper course of treatment" may depend on matters related to "observations made in a household setting." *Ibid.*

These suggested distinctions, if true, would apparently not apply to guardians, whose legal obligations to protect the persons and estates of their wards would seem to require as much connection to the one class of people as to the other.

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[7] Petitioner also argues that mental retardation is different from most cases of mental illness in being a permanent condition that may require a lifetime of care. See Brief for Petitioner 31. But petitioner completely fails to explain how the permanence of the condition or the likely need of lifetime care can rationally justify a regime in which those alleged to require institutionalization based on mental retardation face a greater risk of erroneous curtailment of liberty than those who are alleged to require it based on mental illness. The distinction proffered by the State (accepting it to be factually accurate and not based merely on stereotype) cuts quite the other way. The possibility that a condition once thought to justify commitment will last a lifetime suggests that a person committed to an institution on the basis of mental retardation is less likely to regain his liberty than one institutionalized on some other basis. If this could rationally justify any disparity in commitment standards, it could only be in requiring stricter protection in mental retardation cases than in those based on mental illness, not the other way around.

In any event, although these differences might justify a scheme in which immediate relatives and guardians were automatically called as witnesses in cases seeking institutionalization on the basis of mental retardation,[8] they are completely unrelated to those aspects of the statute to which Doe objects: permitting these immediate relatives and guardians to be involved "as parties" so as to give them, among other things, the right to appeal as "adverse" a decision not to institutionalize the individual who is subject to the proceedings. Where the third party supports commitment, someone who is alleged to be retarded is faced not only with a second advocate for institutionalization, but with a second prosecutor with the capacity to call and cross-examine witnesses, to obtain expert testimony and to raise an appeal that might not otherwise be taken, whereas a person said to require commitment on the basis of mental illness is not. This is no mere theoretical difference, and my suggestion that relatives or guardians may support curtailment of liberty finds support in the record in this case. It indicates that of the 431 commitments to Kentucky's state-run institutions for the mentally retarded during a period between 1982 and the middle of 1985, all but one were achieved through the application or consent of family members or guardians. See Record, State's Answers to Plaintiff's First Set of Interrogatories 2, 17.

The Court simply points to no characteristic of mental retardation that could rationally justify imposing this burden of a second prosecutor on those alleged to be mentally retarded where the State has decided not to impose it upon those alleged to be mentally ill. Even if we assumed a generally more regular connection between the relatives and guardians of those alleged to be retarded than those said to

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[8] Of course both guardians and relatives can already act as witnesses in each kind of proceeding subject only to the limitations of relevance and interest.

be mentally ill, it would not explain why the former should be subject to a second prosecutor when the latter are not.

The same may be said about the Court's second suggested justification, that the mentally ill may have a need for privacy not shown by the retarded. Even assuming the ill need some additional privacy, and that participation of others in the commitment proceeding should therefore be limited "to the smallest group compatible with due process," *ante*, at 329, why should the retarded be subject to a second prosecutor? The Court provides no answer.[9]

Without plausible justification, Kentucky is being allowed to draw a distinction that is difficult to see as resting on anything other than the stereotypical assumption that the retarded are "perpetual children," an assumption that has historically been taken to justify the disrespect and "grotesque mistreatment" to which the retarded have been subjected. See *Cleburne*, 473 U. S., at 454 (STEVENS, J., concurring) (internal quotation marks and citation omitted). As we said in *Cleburne*, the mentally retarded are not "all cut from the same pattern: . . . they range from those whose disability is not immediately evident to those who must be constantly cared for." *Id.*, at 442. In recent times, at least when imposing the responsibilities of citizenship, our jurisprudence has seemed to reject the analogy between mentally retarded adults and nondisabled children. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 338 (1989) (controlling opinion of O'CONNOR, J.) (not "all mentally retarded people . . .—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty"); see also *id.*, at 340 ("reliance on mental

[9] I also note that the Court provides no support for its speculation that an adult who develops mental illness will have a greater need or desire for privacy in an involuntary commitment proceeding than an adult who is mentally retarded.

age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law"). But cf. *ante*, at 331 (citing *Parham* v. *J. R.*, 442 U. S. 584 (1979), a case about parents' rights over their minor children). When the State of Kentucky sets up its respective schemes for institutionalization on the basis of mental illness and mental retardation, it too is obliged to reject that analogy, and to rest any difference in standards for involuntary commitment as between the ill and the retarded on some plausible reason.

IV

In the absence of any rational justification for the disparate treatment here either with respect to the burdens of proof or the participation of third parties in institutionalization proceedings, I would affirm the judgment of the Court of Appeals. Because of my conclusion, that the statute violates equal protection, I do not reach the question of its validity under the Due Process Clause.

Syllabus

JOHNSON *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 92–5653. Argued April 26, 1993—Decided June 24, 1993

A jury found petitioner Johnson guilty of capital murder for a crime he committed when he was 19 years old. In conformity with the Texas capital sentencing statute then in effect, the trial court instructed the jury during the trial's penalty phase to answer two special issues: (1) whether Johnson's conduct was committed deliberately and with the reasonable expectation that death would result, and (2) whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was also instructed, *inter alia*, that in determining each of these issues, it could take into consideration all the evidence submitted to it, whether aggravating or mitigating, in either phase of the trial. A unanimous jury answered yes to both special issues, and the trial court sentenced Johnson to death, as required by law. Shortly after the State Court of Criminal Appeals affirmed the conviction and sentence, this Court issued *Penry* v. *Lynaugh*, 492 U. S. 302. In denying Johnson's motion for rehearing, the state appellate court rejected his contentions that the special issues did not allow his jury to give adequate mitigating effect to evidence of his youth and that *Penry* required a separate instruction on the question.

Held: The Texas procedures as applied in this case were consistent with the Eighth and Fourteenth Amendments under this Court's precedents. Pp. 359–373.

(a) A review of the Court's relevant decisions demonstrates the constitutional requirements regarding consideration of mitigating circumstances by sentencers in capital cases. Although the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the particular offense that the defendant proffers as a basis for a sentence less than death, see, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty, see, *e. g.*, *Boyde* v. *California*, 494 U. S. 370, 377. Pp. 359–362.

(b) The Texas law under which Johnson was sentenced has been the principal concern of a series of opinions in this Court. Although, in *Jurek* v. *Texas*, 428 U. S. 262, 276, 277, six Justices agreed that, as a

general matter, the special issues system satisfied the foregoing constitutional requirements, the Court later held, in *Penry* v. *Lynaugh*, *supra*, that the system did not allow for sufficient consideration of the defendant's mitigating evidence of his mental retardation and childhood abuse in light of his particular circumstances, *id.*, at 320–323, and that the trial court erred in not instructing the jury that it could consider and give effect to that mitigating evidence by declining to impose the death penalty, *id.*, at 328. However, the Court concluded that it was not creating a new rule, and characterized its holding as a straightforward application of *Jurek*, *Lockett*, and *Eddings*, making it clear that these cases can stand together with *Penry*, see 492 U. S., at 314–318. The Court confirmed this limited view of *Penry* and its scope in *Graham* v. *Collins*, 506 U. S. 461, 474, and held that the defendant's mitigating evidence of his youth, family background, and positive character traits was not placed beyond the jury's effective reach by the Texas scheme, *id.*, at 475. Pp. 362–366.

(c) The Texas special issues allowed adequate consideration of Johnson's youth. There is no reasonable likelihood, see *Boyde*, *supra*, at 380, that Johnson's jury would have found itself foreclosed from considering the relevant aspects of his youth, since it received the second special issue instruction and was told to consider all mitigating evidence. That there is ample room in the future dangerousness assessment for a juror to take account of youth as a mitigating factor is what distinguishes this case from *Penry*, *supra*, at 323. There, the second special issue did not allow the jury to give mitigating effect to expert medical testimony that the defendant's mental retardation prevented him from learning from experience, since that evidence could only logically be considered within the future dangerousness inquiry as an aggravating factor. In contrast, youth's ill effects are subject to change as a defendant ages and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue. Because such consideration is a comprehensive inquiry that is more than a question of historical fact, the Court rejects Johnson's related arguments that the second special issue's forward-looking perspective and narrowness prevented the jury from, respectively, taking account of how his youth bore upon his personal culpability and making a "reasoned moral response" to the evidence of his youth. For the Court to find a constitutional defect in Johnson's sentence, it would have to overrule *Jurek* by requiring a further instruction whenever a defendant introduced mitigating evidence that had *some* arguable relevance beyond the special issues; alter the rule of *Lockett* and *Eddings* to require that a jury be able to give effect to mitigating evidence in every conceivable manner in which it might be

relevant; and remove the States' power to structure the consideration of mitigating evidence under, *e. g., Boyde.* Pp. 366–373.

773 S. W. 2d 322, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and THOMAS, JJ., joined. SCALIA, J., *post*, p. 373, and THOMAS, J., *post*, p. 374, filed concurring opinions. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 374.

Michael E. Tigar argued the cause for petitioner. With him on the briefs were *Robert C. Owen* and *Jeffrey J. Pokorak.*

Dana E. Parker, Assistant Attorney General of Texas, argued the cause for respondent. With her on the brief were *Dan Morales*, Attorney General, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Michael P. Hodge*, Assistant Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

For the second time this Term, we consider a constitutional challenge to the former Texas capital sentencing system. Like the condemned prisoner in *Graham* v. *Collins*, 506 U. S. 461 (1993), the petitioner here claims that the Texas special issues system in effect until 1991 did not allow his jury to give adequate mitigating effect to evidence of his youth. *Graham* was a federal habeas corpus proceeding where the petitioner had to confront the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), barring the application of new rules of law on federal habeas corpus. In part because the relief sought by Graham would have required a new rule within the meaning of *Teague*, we denied relief. The instant case comes to us on direct review of petitioner's conviction and sentence, so we consider it without the constraints of *Teague*, though of course with the customary respect for the

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

doctrine of *stare decisis*. Based upon our precedents, including much of the reasoning in *Graham*, we find the Texas procedures as applied in this case were consistent with the Eighth and Fourteenth Amendments.

I

Petitioner, then 19 years of age, and his companion, Amanda Miles, decided to rob Allsup's convenience store in Snyder, Texas, on March 23, 1986. After agreeing that there should be no witnesses to the crime, the pair went to the store to survey its layout and, in particular, to determine the number of employees working in the store that evening. They found that the only employee present during the predawn hours was a clerk, Jack Huddleston. Petitioner and Miles left the store to make their final plans.

They returned to Allsup's a short time later. Petitioner, a handgun in his pocket, reentered the store with Miles. After waiting for other customers to leave, petitioner asked Huddleston whether the store had any orange juice in one gallon plastic jugs because there were none on the shelves. Saying he would check, Huddleston went to the store's cooler. Petitioner followed Huddleston there, told Huddleston the store was being robbed, and ordered him to lie on the floor. After Huddleston complied with the order and placed his hands behind his head, petitioner shot him in the back of the neck, killing him. When petitioner emerged from the cooler, Miles had emptied the cash registers of about $160. They each grabbed a carton of cigarettes and fled.

In April 1986, a few weeks after this crime, petitioner was arrested for a subsequent robbery and attempted murder of a store clerk in Colorado City, Texas. He confessed to the murder of Jack Huddleston and the robbery of Allsup's and was tried and convicted of capital murder. The homicide qualified as a capital offense under Texas law because petitioner intentionally or knowingly caused Huddleston's death

and the murder was carried out in the course of committing a robbery. Tex. Penal Code Ann. §§ 19.02(a)(1), 19.03(a)(2) (1989).

After the jury determined that petitioner was guilty of capital murder, a separate punishment phase of the proceedings was conducted in which petitioner's sentence was determined. In conformity with the Texas capital sentencing statute then in effect, see Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981),[1] the trial court instructed the jury that it was to answer two special issues:

> "[(1)] Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> . . . . . .
>
> "[(2)] Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?"[2] App. 148–149.

The trial court made clear to the jury the consequences of its answers to the special issues:

> "You are further instructed that if the jury returns affirmative or 'yes' answer *[sic]* to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or 'no' answer to any Issue submitted, the Court shall sentence the Defendant to life in prison." *Id.*, at 146.

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[1] The Texas Legislature amended the statute in 1991. See Art. 37.071(2) (Vernon Supp. 1992–1993).

[2] The statute also required that a third special issue, asking whether the defendant's act was "unreasonable in response to the provocation, if any, by the deceased," be submitted to the jury "if raised by the evidence." Art. 37.071(b)(3) (Vernon 1981). Petitioner does not contest the trial court's decision not to submit the third special issue in this case.

The jury was instructed not to consider or discuss the possibility of parole. *Id.*, at 147. The trial court also instructed the jury as follows concerning its consideration of mitigating evidence:

> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues." *Ibid.*

Although petitioner's counsel filed various objections to the jury charge, there was no request that a more expansive instruction be given concerning any particular mitigating circumstance, including petitioner's youth.

In anticipation of the trial court's instructions, the State during the punishment phase of the proceedings presented numerous witnesses who testified to petitioner's violent tendencies. The most serious evidence related to the April convenience store robbery in Colorado City. Witnesses testified that petitioner had shot that store clerk in the face, resulting in the victim's permanent disfigurement and brain damage. Other witnesses testified that petitioner had fired two shots at a man outside a restaurant in Snyder only six days after the murder of Huddleston, and a sheriff's deputy who worked in the jail where petitioner was being held testified that petitioner had threatened to "get" the deputy when he got out of jail.

Petitioner's acts of violence were not limited to strangers. A longtime friend of petitioner, Beverly Johnson, testified that in early 1986 petitioner had hit her, thrown a large rock at her head, and pointed a gun at her on several occasions. Petitioner's girlfriend, Paula Williams, reported that, after

petitioner had become angry with her one afternoon in 1986, he threatened her with an axe. There were other incidents, of less gravity, before 1986. One of petitioner's classmates testified that petitioner cut him with a piece of glass while they were in the seventh grade. Another classmate testified that petitioner also cut him with glass just a year later, and there was additional evidence presented that petitioner had stabbed a third classmate with a pencil.

The State established that the crimes committed in 1986 were not petitioner's first experience with the criminal justice system. Petitioner had been convicted in 1985 of a store burglary in Waco, Texas. Petitioner twice violated the terms of probation for that offense by smoking marijuana. Petitioner was still on probation when he committed the Huddleston murder.

The defense presented petitioner's father, Dorsie Johnson, Sr., as its only witness. The elder Johnson attributed his son's criminal activities to his drug use and his youth. When asked by defense counsel whether his son at the age of 19 was "a real mature person," petitioner's father answered:

> "No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it." *Id.*, at 27.

At the close of his testimony, Johnson summarized the role that he thought youth had played in his son's crime:

> "[A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not—I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be—well, he just don't—he just don't evaluate what is worth—what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't." *Id.*, at 47.

The father also testified that his son had been a regular churchgoer and his problems were attributable in large part to the death of his mother following a stroke in 1984 and the murder of his sister in 1985. Finally, the senior Johnson testified to his son's remorse over the killing of Huddleston.

At the voir dire phase of the proceedings, during which more than 90 prospective jurors were questioned over the course of 15 days, petitioner's counsel asked the venirepersons whether they believed that people were capable of change and whether the venirepersons had ever done things as youths that they would not do now. See, *e. g.*, Tr. of Voir Dire in No. 5575 (132d Jud. Dist. Ct., Scurry County, Tex.), pp. 1526–1529 (Juror Swigert); *id.*, at 1691–1692 (Juror Freeman); *id.*, at 2366 (Juror Witte); *id.*, at 2630–2632 (Juror Raborn).[3] Petitioner's counsel returned to this theme in his closing argument:

> "The question—the real question, I think, is whether you believe that there is a possibility that he can change. You will remember that that was one thing every one of you told me you agreed—every one of you agreed with me that people can change. If you agree that people can change, then that means that Dorsie can change and that takes question two [regarding future dangerousness] out of the realm of probability and into possibility,

[3] The colloquy on this point between petitioner's counsel and Juror Raborn is illustrative of the discussions had with the other jurors:

"Q. Okay. Do you feel that—let me ask you this. Do you feel a person who is—or a young person will do things that they will not do in later years, thirty or forty—

"A. I believe that.

"Q. Do you believe that people can change?

"A. Yes, I believe they can. I've known some that have.

"Q. Do you think that the way a person acts in the present or the past or how he has acted in the past is an absolute indicator of what he will do in the future, thirty or forty years down the road?

"A. No, not on down the line. Like I say, you can change." Tr. of Voir Dire, at 2630–2631.

> you see, because if he can change, then it is no longer probable that he will do these things, but only possible that he can and will do these things, you see.
>
> "If people couldn't change, if you could say I know people cannot change, then you could say probably. But every one of you knows in your heart and in your mind that people can and people do change and Dorsie Johnson can change and, therefore, the answer to question two should be no." App. 81.

Counsel also urged the jury to remember the testimony of petitioner's father. *Id.*, at 73–74.

The jury was instructed that the State bore the burden of proving each special issue beyond a reasonable doubt. *Id.*, at 145. A unanimous jury found that the answer to both special issues was yes, and the trial court sentenced petitioner to death, as required by law. Tex. Code Crim. Proc. Ann., Art. 37.071(e) (Vernon 1981).

On appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence after rejecting petitioner's seven allegations of error, none of which involved a challenge to the punishment-phase jury instructions. 773 S. W. 2d 322 (1989). Five days after that state court ruling, we issued our opinion in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Petitioner filed a motion for rehearing in the Texas Court of Criminal Appeals arguing, among other points, that the special issues did not allow for adequate consideration of his youth. Citing *Penry*, petitioner claimed that a separate instruction should have been given that would have allowed the jury to consider petitioner's age as a mitigating factor. Although petitioner had not requested such an instruction at trial and had not argued the point prior to the rehearing stage on appeal, no procedural bar was interposed. Instead, the Court of Criminal Appeals considered the argument on the merits and rejected it. After noting that it had already indicated in *Lackey* v. *State*, 819 S. W. 2d 111, 134 (Tex. Crim. App. 1989), that youth was relevant to the jury's consider-

ation of the second special issue, the court reasoned that "[i]f a juror believed that [petitioner's] violent actions were a result of his youth, that same juror would naturally believe that [petitioner] would cease to behave violently as he grew older." App. 180. The court concluded that "the jury was able to express a reasoned moral response to [petitioner's] mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court." *Id.*, at 180–181.

Petitioner filed a petition for certiorari, which we granted. 506 U. S. 1090 (1993).

II

A

This is the latest in a series of decisions in which the Court has explained the requirements imposed by the Eighth and Fourteenth Amendments regarding consideration of mitigating circumstances by sentencers in capital cases. The earliest case in the decisional line is *Furman* v. *Georgia*, 408 U. S. 238 (1972). At the time of *Furman*, sentencing juries had almost complete discretion in determining whether a given defendant would be sentenced to death, resulting in a system in which there was "no meaningful basis for distinguishing the few cases in which [death was] imposed from the many cases in which it [was] not." *Id.*, at 313 (WHITE, J., concurring). Although no two Justices could agree on a single rationale, a majority of the Court in *Furman* concluded that this system was "cruel and unusual" within the meaning of the Eighth Amendment. The guiding principle that emerged from *Furman* was that States were required to channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a "wanto[n]" and "freakis[h]" manner. *Id.*, at 310 (Stewart, J., concurring).

Four Terms after *Furman*, we decided five cases, in opinions issued on the same day, concerning the constitutionality of various capital sentencing systems. *Gregg* v. *Georgia*,

428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). In the wake of *Furman*, at least 35 States had abandoned sentencing schemes that vested complete discretion in juries in favor of systems that either (i) "specif[ied] the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence," or (ii) "ma[de] the death penalty mandatory for certain crimes." *Gregg*, *supra*, at 179–180 (opinion of Stewart, Powell, and STEVENS, JJ.). In the five cases, the controlling joint opinion of three Justices reaffirmed the principle of *Furman* that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189; accord, *Proffitt*, *supra*, at 258 (opinion of Stewart, Powell, and STEVENS, JJ.).

Based upon this principle, it might have been thought that statutes mandating imposition of the death penalty if a defendant was found guilty of certain crimes would be consistent with the Constitution. But the joint opinions of Justices Stewart, Powell, and STEVENS indicated that there was a second principle, in some tension with the first, to be considered in assessing the constitutionality of a capital sentencing scheme. According to the three Justices, "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, *supra*, at 304 (plurality opinion); accord, *Gregg*, *supra*, at 189–190, n. 38 (opinion of Stewart, Powell, and STEVENS, JJ.); *Jurek*, *supra*, at 273–274 (opinion of Stewart, Powell, and STEVENS, JJ.); *Roberts*, *supra*, at 333 (plurality opinion of Stewart, Powell, and STEVENS, JJ.). Based upon this second principle, the Court struck down mandatory imposition of the death penalty for specified crimes as inconsistent with the requirements of the Eighth and Fourteenth

Amendments. See *Woodson, supra,* at 305; *Roberts, supra,* at 335–336.

Two Terms later, a plurality of the Court in *Lockett* v. *Ohio,* 438 U. S. 586 (1978), refined the requirements related to the consideration of mitigating evidence by a capital sentencer. Unlike the mandatory schemes struck down in *Woodson* and *Roberts* in which all mitigating evidence was excluded, the Ohio system at issue in *Lockett* permitted a limited range of mitigating circumstances to be considered by the sentencer.[4] The plurality nonetheless found this system to be unconstitutional, holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U. S., at 604. A majority of the Court adopted the *Lockett* rule in *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982); accord, *Hitchcock* v. *Dugger,* 481 U. S. 393, 398–399 (1987); *Skipper* v. *South Carolina,* 476 U. S. 1, 4 (1986), and we have not altered the rule's central requirement. "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *McKoy* v. *North Carolina,* 494 U. S. 433, 456 (1990) (KENNEDY, J., concurring

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[4] Once an Ohio defendant was found guilty of aggravated murder involving at least one of seven aggravating circumstances, the judge was required to sentence the defendant to death unless at least one of three mitigating circumstances was present: (1) the victim induced or facilitated the offense; (2) it is unlikely the crime would have been committed but for the fact that the defendant was acting under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the defendant's psychosis or mental deficiency. See *Lockett,* 438 U. S., at 607–608.

in judgment); see also *Graham*, 506 U. S., at 475; *Saffle* v. *Parks*, 494 U. S. 484, 490–491 (1990).

Although *Lockett* and *Eddings* prevent a State from placing relevant mitigating evidence "beyond the effective reach of the sentencer," *Graham*, *supra*, at 475, those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty,'" *Boyde* v. *California*, 494 U. S. 370, 377 (1990) (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion)); see also *Saffle*, *supra*, at 490.

B

The Texas law under which petitioner was sentenced has been the principal concern of four previous opinions in our Court. See *Jurek* v. *Texas*, *supra*; *Franklin* v. *Lynaugh*, *supra*; *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Graham*, *supra*. As we have mentioned, *Jurek* was included in the group of five cases addressing the post-*Furman* statutes in 1976.

In *Jurek*, the joint opinion of Justices Stewart, Powell, and STEVENS first noted that there was no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment, the statute having adopted five different classifications of murder for that purpose. See *Jurek*, 428 U. S., at 270–271. Turning to the mitigation side of the sentencing system, the three Justices said: "[T]he constitutionality of the Texas procedures turns on whether the enumerated [special issues] allow consideration of particularized mitigating factors." *Id.*, at 272. In assessing the constitutionality of the mitigation side of this scheme, the three Justices examined in detail only the second special issue, which asks whether "'there is a probability that the defend-

ant would commit criminal acts of violence that would constitute a continuing threat to society.'" Although the statute did not define these terms, the joint opinion noted that the Texas Court of Criminal Appeals had indicated that it would interpret the question in a manner that allowed the defendant to bring all relevant mitigating evidence to the jury's attention:

> "'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' [*Jurek* v. *State*,] 522 S. W. 2d [934], 939–940 [(Tex. Crim. App. 1975)]." *Id.*, at 272–273.

The joint opinion determined that the Texas system satisfied the requirements of the Eighth and Fourteenth Amendments concerning the consideration of mitigating evidence: "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.*, at 276. Three other Justices agreed that the Texas system satisfied constitutional requirements. See *id.*, at 277 (WHITE, J., concurring in judgment).

We next considered a constitutional challenge involving the Texas special issues in *Franklin* v. *Lynaugh*, *supra*. Although the defendant in that case recognized that we had

upheld the constitutionality of the Texas system as a general matter in *Jurek*, he claimed that the special issues did not allow the jury to give adequate weight to his mitigating evidence concerning his good prison disciplinary record and that the jury, therefore, should have been instructed that it could consider this mitigating evidence independent of the special issues. 487 U. S., at 171–172. A plurality of the Court rejected the defendant's claim, holding that the second special issue provided an adequate vehicle for consideration of the defendant's prison record as it bore on his character. *Id.*, at 178. The plurality also noted that *Jurek* foreclosed the defendant's argument that the jury was still entitled to cast an "independent" vote against the death penalty even if it answered yes to the special issues. 487 U. S., at 180. The plurality concluded that, with its special issues system, Texas had guided the jury's consideration of mitigating evidence while still providing for sufficient jury discretion. See *id.*, at 182. Although JUSTICE O'CONNOR expressed reservations about the Texas scheme for other cases, she agreed that the special issues had not inhibited the jury's consideration of the defendant's mitigating evidence in that case. See *id.*, at 183–186 (opinion concurring in judgment).

The third case in which we considered the Texas statute is the pivotal one from petitioner's point of view, for there we set aside a capital sentence because the Texas special issues did not allow for sufficient consideration of the defendant's mitigating evidence. *Penry* v. *Lynaugh*, *supra*. In *Penry*, the condemned prisoner had presented mitigating evidence of his mental retardation and childhood abuse. We agreed that the jury instructions were too limited for the appropriate consideration of this mitigating evidence in light of Penry's particular circumstances. We noted that "[t]he jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U. S., at 320. Absent any definition for the term "delib-

erately," we could not "be sure that the jury was able to give effect to the mitigating evidence . . . in answering the first special issue," *id.*, at 323, so we turned to the second special issue, future dangerousness. The evidence in the case suggested that Penry's mental retardation rendered him unable to learn from his mistakes. As a consequence, we decided the mitigating evidence was relevant to the second special issue "only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Ibid.* The Court concluded that the trial court had erred in not instructing the jury that it could "consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Id.*, at 328. The Court was most explicit in rejecting the dissent's concern that Penry was seeking a new rule, in contravention of *Teague* v. *Lane*, 489 U. S. 288 (1989). Indeed, the Court characterized its holding in *Penry* as a straightforward application of our earlier rulings in *Jurek*, *Lockett*, and *Eddings*, making it clear that these cases can stand together with *Penry*. See *Penry*, 492 U. S., at 314–318.

We confirmed this limited view of *Penry* and its scope in *Graham* v. *Collins*. There we confronted a claim by a defendant that the Texas system had not allowed for adequate consideration of mitigating evidence concerning his youth, family background, and positive character traits. In rejecting the contention that *Penry* dictated a ruling in the defendant's favor, we stated that *Penry* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute," 506 U. S., at 474, and we noted that a contrary view of *Penry* would be inconsistent with the *Penry* Court's conclusion that it was not creating a "new rule," 506 U. S., at 474. We also did not accept the view that the *Lockett* and *Eddings* line of cases, upon which *Penry* rested, compelled a holding for the defendant in *Graham*:

> "In those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence. In this case, however, Graham's mitigating evidence was not placed beyond the jury's effective reach." *Graham*, 506 U. S., at 475.

In addition, we held that Graham's case differed from *Penry* in that "Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness." 506 U. S., at 475. We concluded that, even with the benefit of the subsequent *Penry* decision, reasonable jurists at the time of Graham's sentencing "would [not] have deemed themselves compelled to accept Graham's claim." 506 U. S., at 477. Thus, we held that a ruling in favor of Graham would have required the impermissible application of a new rule under *Teague*. 506 U. S., at 477.

III

Today we are asked to take the step that would have been a new rule had we taken it in *Graham*. Like Graham, petitioner contends that the Texas sentencing system did not allow the jury to give adequate mitigating effect to the evidence of his youth. Unlike Graham, petitioner comes here on direct review, so *Teague* presents no bar to the rule he seeks. The force of *stare decisis*, though, which rests on considerations parallel in many respects to *Teague*, is applicable here. The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a mis-

interpretation of some constitutional command. See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986); *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*. See, *e. g.*, *Sumner* v. *Shuman*, 483 U. S. 66, 81–82 (1987); *Eddings*, 455 U. S., at 115; *Lockett*, 438 U. S., at 608 (plurality opinion). Our cases recognize that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, *supra*, at 115. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence.

The question presented here is whether the Texas special issues allowed adequate consideration of petitioner's youth. An argument that youth can never be given proper mitigating force under the Texas scheme is inconsistent with our holdings in *Jurek*, *Graham*, and *Penry* itself. The standard against which we assess whether jury instructions satisfy the rule of *Lockett* and *Eddings* was set forth in *Boyde* v. *California*, 494 U. S. 370 (1990). There we held that a reviewing court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380. Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar.

Ibid. In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a "commonsense understanding of the instructions in the light of all that has taken place at the trial." *Id.*, at 381.

We decide that there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth. Pursuant to the second special issue, the jury was instructed to decide whether there was "a probability that [petitioner] would commit criminal acts of violence that would constitute a continuing threat to society." App. 149. The jury also was told that, in answering the special issues, it could consider all the mitigating evidence that had been presented during the guilt and punishment phases of petitioner's trial. *Id.*, at 147. Even on a cold record, one cannot be unmoved by the testimony of petitioner's father urging that his son's actions were due in large part to his youth. It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue. The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination. As we recognized in *Graham*, the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating, does not mean that the rule of *Lockett* is violated. *Graham*, 506 U. S., at 475–476. As long as the mitigating evidence is within "the effective reach of the sentencer," the requirements of the Eighth Amendment are satisfied. *Ibid.*

That the jury had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth is what distinguishes this case from *Penry*. In *Penry*, there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from experience. 492 U. S., at 308–309. Although the evidence of the mental illness fell short of providing Penry a defense to prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor. *Id.*, at 323. *Penry* remains the law and must be given a fair reading. The evidence of petitioner's youth, however, falls outside *Penry*'s ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Petitioner does not contest that the evidence of youth could be given some effect under the second special issue. Instead, petitioner argues that the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed. According to petitioner, "[a] prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed." Brief for Petitioner 38. Contrary to petitioner's suggestion, however, this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct. See *Skipper*, 476 U. S., at 5 ("Consideration of a de-

fendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing"). If any jurors believed that the transient qualities of petitioner's youth made him less culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness. It is true that Texas has structured consideration of the relevant qualities of petitioner's youth, but in so doing, the State still "allow[s] the jury to give effect to [this] mitigating evidence in making the sentencing decision." *Saffle*, 494 U. S., at 491. Although Texas might have provided other vehicles for consideration of petitioner's youth, no additional instruction beyond that given as to future dangerousness was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.

In a related argument, petitioner, quoting a portion of our decision in *Penry*, *supra*, at 328, claims that the jurors were not able to make a "reasoned moral response" to the evidence of petitioner's youth because the second special issue called for a narrow factual inquiry into future dangerousness. We, however, have previously interpreted the Texas special issues system as requiring jurors to "exercise a range of judgment and discretion." *Adams* v. *Texas*, 448 U. S. 38, 46 (1980). This view accords with a "commonsense understanding" of how the jurors were likely to view their instructions and to implement the charge that they were entitled to consider all mitigating evidence from both the trial and sentencing phases. *Boyde*, 494 U. S., at 381. The crucial term employed in the second special issue—"continuing threat to society"—affords the jury room for independent judgment in reaching its decision. Indeed, we cannot forget that "a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in

'pure balancing' States." *Franklin*, 487 U. S., at 182, n. 12 (plurality opinion). In *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), four Members of the Court in dissent used the Texas statute as an example of a capital sentencing system that permitted the exercise of judgment. That opinion stated:

> "[The two special issues] require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability. The Texas statute directs the imposition of the death penalty only after the jury has decided that the defendant's actions were sufficiently egregious to warrant death." *Id.*, at 322 (Brennan, J., dissenting).

The Texas Court of Criminal Appeals' view of the future dangerousness inquiry supports our conclusion that consideration of the second special issue is a comprehensive inquiry that is more than a question of historical fact. In reviewing death sentences imposed under the former Texas system, that court has consistently looked to a nonexclusive list of eight factors, which includes the defendant's age, in deciding whether there was sufficient evidence to support a yes answer to the second special issue. See, *e. g.*, *Ellason* v. *State*, 815 S. W. 2d 656, 660 (1991); *Brasfield* v. *State*, 600 S. W. 2d 288 (1980).

There might have been a juror who, on the basis solely of sympathy or mercy, would have opted against the death penalty had there been a vehicle to do so under the Texas special issues scheme. But we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, we have said that "[i]t would be very difficult

to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle* v. *Parks*, 494 U. S., at 493; see also *California* v. *Brown*, 479 U. S. 538, 542–543 (1987) (permitting an instruction that the jury could not base its sentencing decision on sympathy).

For us to find a constitutional defect in petitioner's death sentence, we would have to alter in significant fashion this Court's capital sentencing jurisprudence. The first casualty of a holding in petitioner's favor would be *Jurek*. The inevitable consequence of petitioner's argument is that the Texas special issues system in almost every case would have to be supplemented by a further instruction. As we said in *Graham*:

> "[H]olding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues . . . would be to require in all cases that a fourth 'special issue' be put to the jury: '"Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?"'" 506 U. S., at 476 (quoting *Franklin*, *supra*, at 180, n. 10).

In addition to overruling *Jurek*, accepting petitioner's arguments would entail an alteration of the rule of *Lockett* and *Eddings*. Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.

The fundamental flaw in petitioner's position is its failure to recognize that "[t]here is a simple and logical difference between rules that govern what factors the jury must be

permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle, supra,* at 490. To rule in petitioner's favor, we would have to require that a jury be instructed in a manner that leaves it free to depart from the special issues in every case. This would, of course, remove all power on the part of the States to structure the consideration of mitigating evidence—a result we have been consistent in rejecting. See, *e. g., Boyde,* 494 U. S., at 377; *Saffle, supra,* at 493; *Franklin, supra,* at 181 (plurality opinion).

The reconciliation of competing principles is the function of law. Our capital sentencing jurisprudence seeks to reconcile two competing, and valid, principles in *Furman,* which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer. Our holding in *Jurek* reflected the understanding that the Texas sentencing scheme "accommodates *both* of these concerns." *Franklin, supra,* at 182 (plurality opinion). The special issues structure in this regard satisfies the Eighth Amendment and our precedents that interpret its force. There was no constitutional infirmity in its application here.

The judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider "all relevant mitigating evidence" is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled. See *Walton* v. *Arizona,* 497 U. S. 639, 656 (1990) (SCALIA, J., concurring in part and concurring in judgment). That will continue to be true unless and until the sort of "channeling" of mitigating discretion that Texas has engaged in here is not merely *permitted* (as the Court today holds), but positively

required—a further elaboration of our intricate Eighth Amendment jurisprudence that I neither look forward to nor would support.

Today's decision, however, is simply a clarification (and I think a plainly correct one) of this Court's opinions in *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988) (plurality opinion), and *Boyde* v. *California*, 494 U. S. 370 (1990), which I joined. In fact, the essence of today's holding (to the effect that discretion *may* constitutionally be channeled) was set forth in my dissent in *Penry* v. *Lynaugh*, 492 U. S. 302, 350 (1989) (SCALIA, J., concurring in part and dissenting in part). Accordingly, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

Although *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), "remains the law," *ante*, at 369, in the sense that it has not been expressly overruled, I adhere to my view that it was wrongly decided. *Graham* v. *Collins*, 506 U. S. 461, 478 (1993) (THOMAS, J., concurring). I also continue to believe it has been substantially narrowed by later opinions. *Id.*, at 497, n. 10. Because petitioner's youth had mitigating relevance to the second special issue, however, this case is readily distinguishable from *Penry* and does not compel its reconsideration. I therefore join the Court's opinion.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, dissenting.

Dorsie Lee Johnson was 19 years old when he committed the murder that led to his death sentence. Today, the Court upholds that sentence, even though the jurors who considered Johnson's case were not allowed to give full effect to his strongest mitigating evidence: his youth. The Court reaches this result only by invoking a highly selective version of *stare decisis* and misapplying our habeas precedents to a case on direct review. Therefore, I respectfully dissent.

I

By all accounts, Dorsie Johnson was not a model youth. As an adolescent he frequently missed school, and when he did attend, he often was disruptive. He was drinking and using drugs by the time he was 16, habits that had intensified by the time he was 19. Johnson's father testified that the deaths of Johnson's mother and sister in 1984 and 1985 had affected Johnson deeply, but he primarily attributed Johnson's behavior to drug use and youth. A jury hearing this evidence easily could conclude, as Johnson's jury did, that the answer to the second Texas special question—whether it was probable that Johnson "would commit criminal acts of violence that would constitute a continuing threat to society," Tex. Code Crim. Proc. Ann., Art. 37.071(b)(2) (Vernon 1981)—was yes. It is possible that the jury thought Johnson might outgrow his temper and violent behavior as he matured, but it is more likely that the jury considered the pattern of escalating violence to be an indication that Johnson would become even more dangerous as he grew older. Even if the jurors viewed Johnson's youth as a transient circumstance, the dangerousness associated with that youth would not dissipate until sometime in the future, and it is reasonably likely that the jurors still would have understood the second question to require an affirmative answer. See *Graham* v. *Collins*, 506 U. S. 461, 519–520 (1993) (SOUTER, J., dissenting). Thus, to the extent that Johnson's youth was relevant at all to the second Texas special issue, there is a reasonable likelihood that it was an aggravating factor.

But even if the jury could give some mitigating effect to youth under the second special issue, the Constitution still would require an additional instruction in this case. The additional instruction would be required because not one of the special issues under the former Texas scheme, see Art. 37.071, allows a jury to give effect to the most relevant mitigating aspect of youth: its relation to a defendant's "culpability for the crime he committed." *Skipper* v. *South Caro-*

lina, 476 U. S. 1, 4 (1986). A violent and troubled young person may or may not grow up to be a violent and troubled adult, but what happens in the future is unrelated to the *culpability* of the defendant at the time he committed the crime. A jury could conclude that a young person acted "deliberately," Art. 37.071(b)(1), and that he will be dangerous in the future, Art. 37.071(b)(2), yet still believe that he was less culpable *because of his youth* than an adult. I had thought we made clear in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that the vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime:

> "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults." *Id.*, at 115–116 (footnotes and internal quotation marks omitted).

See also *Graham*, *supra*, at 518 (SOUTER, J., dissenting) ("Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible").* In my view, the jury could not express

*Of the 36 States that have death penalty statutes, 30 either specifically list the age of the defendant as a mitigating circumstance or prohibit the execution of those under 18. See Ala. Code § 13A–5–51(7) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(5) (1989); Ark. Code Ann. § 5–4–605(4) (1987); Cal. Penal Code Ann. § 190.3(i) (West 1988); Colo. Rev. Stat. §§ 16–11–802(1)(a), (4)(a) (Supp. 1992); Conn. Gen. Stat. § 53a–46a(g)(1) (1985); Fla. Stat. §§ 921.141(6)(g), 921.142(7)(f) (Supp. 1992); Ill. Rev. Stat., ch. 720, ¶ 5/9–1(c) (1992); Ind. Code § 35–50–2–9(c)(7) (Supp. 1992); Ky. Rev. Stat. Ann. § 532.025(2)(b)(8) (Baldwin 1989); La. Code Crim. Proc. Ann., Art. 905.5(f) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(5) (Supp. 1992); Miss. Code

a "reasoned moral response" to this aspect of Johnson's youth in answering any of the special issues. *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) (internal quotation marks omitted).

II

In *Graham* v. *Collins*, *supra*, the Court held that the relief Johnson seeks today was not "'*dictated* by precedent'" and therefore not available on collateral review. *Id.*, at 467 (quoting *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion)). The issue in *Graham* was not whether an additional instruction to allow the jury to give full effect to Graham's youth was constitutionally mandated. It was only whether the need for such an instruction was "susceptible to debate among reasonable minds." 506 U. S., at 476 (internal quotation marks omitted). I did not agree with the Court's conclusion in *Graham*, see *id.*, at 504–505 (SOUTER, J., dissenting), but even if I had, I would not find *Graham* controlling today.

Teague v. *Lane*, *supra*, states a rule of collateral review: New constitutional rules will not be applied retroactively to invalidate final state convictions on federal habeas review. *Teague* analysis is a threshold issue, see *id.*, at 300–301 (plu-

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Ann. § 99–19–101(6)(g) (Supp. 1992); Mo. Rev. Stat. § 565.032.3(7) (Supp. 1992); Mont. Code Ann. § 46–18–304(7) (1991); Neb. Rev. Stat. § 29–2523(2)(d) (1989); Nev. Rev. Stat. § 200.035(6) (1992); N. H. Rev. Stat. Ann. § 630:5(VI)(d) (Supp. 1992); N. J. Stat. Ann. § 2C:11–3(c)(5)(c) (West 1982); N. M. Stat. Ann. § 31–20A–6(I) (1990); N. C. Gen. Stat. § 15A–2000(f)(7) (1988); Ohio Rev. Code Ann. § 2929.04(B)(4) (1993); Ore. Rev. Stat. § 163.150(1)(c)(A) (1991); Pa. Stat. Ann., Tit. 42, § 9711(e)(4) (Purdon 1982); S. C. Code Ann. § 16–3–20(C)(b)(7) (Supp. 1992); Tenn. Code Ann. § 39–13–204(j)(7) (1991); Utah Code Ann. § 76–3–207(3)(e) (Supp. 1992); Va. Code Ann. § 19.2–264.4(B)(v) (1990); Wash. Rev. Code § 10.95.070(7) (1992). The remaining six States allow the jury to consider any evidence in mitigation without specifying examples. See Del. Code Ann., Tit. 11, § 4209(c) (1987 and Supp. 1992); Ga. Code Ann. § 17–10–30(b) (1990); Idaho Code § 19–2515(c) (1987); Okla. Stat., Tit. 21, § 701.10(C) (Supp. 1992); S. D. Codified Laws § 23A–27A–1 (Supp. 1993); current Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(e) (Vernon Supp. 1993).

rality opinion), however, and cases that reject a claim as requiring a new rule cannot constitute *stare decisis* on direct review. The purpose of *Teague* is to accommodate the competing demands of constitutional imperatives and the "principle of finality which is essential to the operation of our criminal justice system," *id.*, at 309. See *Desist* v. *United States*, 394 U. S. 244, 260–269 (1969) (Harlan, J., dissenting). But the finality concerns of *Teague* come into play only after this Court has denied certiorari or the time for filing a petition for certiorari from the judgment affirming the conviction has expired. See *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6 (1987). Until that time, the interests of finality and comity that caused us to implement the *Teague* standards of retroactivity are not at issue. The only demands with which we need, indeed, must, concern ourselves are those of the Constitution. On direct review, it is our constitutionally imposed duty to resolve "all cases before us . . . in light of our best understanding of governing constitutional principles," *Mackey* v. *United States*, 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgment), without regard to reliance interests of the State.

The analysis of our collateral review doctrine, as well as its purpose, makes the majority's emphasis on cases decided under *Teague* inappropriate in a direct review case. When determining whether a rule is new, we do not ask whether it fairly can be discerned from our precedents; we do not even ask if most reasonable jurists would have discerned it from our precedents. We ask only whether the result was *dictated* by past cases, or whether it is "susceptible to debate among reasonable minds," *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990). And we have recognized that answering this question is difficult, especially when we are faced with the application of settled law to new facts. *Id.*, at 414–415.

If the rule the petitioner sought in *Graham* was a new rule, it was one only because we had never squarely held that the former Texas special issues required an additional instruction regarding youth. That we have not addressed

this particular combination of circumstances on direct review until today, however, cannot create an insurmountable reliance interest in the State of Texas, as the Court suggests. See *ante*, at 366–367. To allow our failure to address an issue to create such an interest would elevate our practice of letting issues "percolate" in the 50 States in the interests of federalism over our responsibility to resolve emerging constitutional issues. On direct review, the question is what the Constitution, read in light of our precedents, requires. In my view, the Eighth Amendment requires an additional instruction in this case.

III

A

There is considerable support in our early cases for the proposition that the sentencer in a capital case must be able to give *full* effect to all mitigating evidence concerning the defendant's character and record and the circumstances of the crime. The Court first recognized the need to give effect to mitigating circumstances in the group of capital cases decided after *Furman* v. *Georgia*, 408 U. S. 238 (1972). In three of those cases, Justices Stewart, Powell, and STEVENS upheld capital sentencing laws against facial challenges, in large part because they believed that the statutes narrowed the category of defendants subject to the death penalty at the same time that they allowed for consideration of the mitigating circumstances regarding the individual defendant and the particular crime. See *Gregg* v. *Georgia*, 428 U. S. 153, 196–197 (1976) (joint opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 250–253 (1976) (joint opinion); *Jurek* v. *Texas*, 428 U. S. 262, 270–274 (1976) (joint opinion). In two other cases, the joint opinions found mandatory death penalty statutes unconstitutional. See *Woodson* v. *North Carolina*, 428 U. S. 280, 303–305 (1976) (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325, 333–336 (1976) (plurality opinion). A mandatory death penalty certainly limited the discretion of the sentencer, but it was not "consistent with the Constitution."

Ante, at 360. The plurality opinion in *Woodson* recognized that allowing a sentencer to consider, but not to give effect to, mitigating circumstances would result in the arbitrary and capricious jury nullification that prevailed prior to *Furman*. See *Woodson*, 428 U. S., at 303. Furthermore, "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*, at 304.

We returned to the issue of mitigating circumstances two Terms later. The Ohio death penalty statute required the sentencer to impose the death penalty on a death-eligible defendant unless one of three mitigating circumstances was established by a preponderance of the evidence. See *Lockett* v. *Ohio*, 438 U. S. 586, 599, n. 7, and 607 (1978) (plurality opinion). In determining the existence of the three circumstances, the sentencer was to consider "'the nature and circumstances of the offense and the history, character, and condition of the offender.'" *Id.*, at 612 (quoting Ohio Rev. Code Ann. § 2929.04(B) (1975)). The Ohio Supreme Court had held that the mitigating circumstances were to be construed liberally, but a plurality of this Court nevertheless found the statute too narrow to pass constitutional muster. 438 U. S., at 608. The *Lockett* plurality concluded from the post-*Furman* cases that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U. S., at 604 (footnote omitted). The statute at issue specifically directed the sentencer to *consider* those very factors. Nevertheless, the plurality found the statute unconstitutional because it provided no *method* by which such consideration

could "affect the sentencing decision." *Id.*, at 608. Accord, *Bell* v. *Ohio*, 438 U. S. 637, 641–642 (1978) (petitioner's counsel offered a wide range of mitigating evidence at the penalty phase, and according to the Ohio statute, the sentencer was to consider that evidence; petitioner's death sentence reversed nevertheless because the statute unconstitutionally limited consideration of the evidence as mitigating factors).

The Court next addressed the constitutional requirement that a sentencer be allowed to give *full* consideration and *full* effect to mitigating circumstances in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). Although the Oklahoma death penalty statute contained no specific restrictions on the types of mitigating evidence that could be considered, neither the Oklahoma trial court nor the Court of Criminal Appeals believed that it could consider, as mitigating factors, the evidence of petitioner's unhappy upbringing and emotional disturbance. See *id.*, at 109–110. The Court reversed petitioner's death sentence. In so doing, it reaffirmed the rule of *Lockett:* The sentencer in a capital case must be permitted to consider relevant mitigating factors in ways that can affect the sentencing decision. This rule, the Court explained, accommodated the twin objectives of our Eighth Amendment jurisprudence: "measured, consistent application and fairness to the accused." 455 U. S., at 111.

Four years later, the Court again made plain that *Lockett* and *Eddings* meant what they said. In *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), we reiterated that evidence, even if not "relate[d] specifically to petitioner's culpability for the crime he committed," *id.*, at 4, must be treated as relevant mitigating evidence if it serves "'as a basis for a sentence less than death,'" *id.*, at 5 (quoting *Lockett*, *supra*, at 604). We summarized the "constitutionally permissible range of discretion in imposing the death penalty" the following Term in *McCleskey* v. *Kemp*, 481 U. S. 279, 305–306 (1987):

> "First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . . Second, States cannot *limit* the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, *the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.*" *Id.*, at 305–306 (emphases added).

We have adhered to this "constitutionally permissible range of discretion" again and again in the years since we decided *McCleskey*, most recently in *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). Accord, *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987); *Penry* v. *Lynaugh*, 492 U. S. 302, 319–328 (1989). The Court attempts to limit these cases by relying on plurality opinions, concurrences, and dicta, see, *e. g.*, *ante*, at 361–362, but until today a majority of this Court has declined to upset our settled Eighth Amendment jurisprudence.

B

Despite the long line of precedent supporting Johnson's argument that the State impermissibly limited the effect that could be given to his youth, the Court, like respondent and the Texas Court of Criminal Appeals, clings doggedly to *Jurek* v. *Texas*, 428 U. S. 262 (1976) (joint opinion). The interpretation on which the Court today relies, however, has nothing to do with what the Court actually decided in *Jurek*. *Jurek* was one of five cases in which this Court evaluated the States' attempts after *Furman* to enact constitutional death penalty statutes. The statutes at issue had been applied a limited number of times, and, of necessity, the challenges were all facial. The Texas Court of Criminal

Appeals, for example, had examined the application of the Texas statute only twice: in *Jurek* itself, and in one other case. 428 U. S., at 273. Because of the posture of the case and the limited history of the statute's application, the Court could not, and did not, determine the statute's constitutionality in all circumstances. Instead, the joint opinion, which contained the narrowest ground of decision in the case, read the Texas court's interpretation of the statute as allowing the jury to consider the "particularized circumstances of the individual offense and the individual offender" before death is imposed. *Id.*, at 274. Therefore, the joint opinion held that the statute fell within what we later called the "constitutionally permissible range of discretion in imposing the death penalty," *McCleskey* v. *Kemp*, *supra*, at 305. *Jurek*, *supra*, at 276.

Because *Jurek* involved only a facial challenge to the Texas statute, the constitutionality of the statute as implemented in particular instances was not at issue. Nor was the "as-applied" constitutionality of the statute implicated in any of our cases until *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988). In *Adams* v. *Texas*, 448 U. S. 38 (1980), for example, the Court still expressed the view that the statute allowed members of the jury to consider *all* relevant evidence, and to use that evidence in answering the special questions, "while remaining true to their instructions and their oaths." *Id.*, at 46. The same is true of the plurality opinion in *Lockett*, which stated that the joint opinion in *Jurek* had approved the Texas statute because it "concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness." 438 U. S., at 607.

When the Court addressed its first as-applied challenge to the Texas death penalty statute in *Franklin*, it was clear that any statements in *Jurek* regarding the statute's constitutionality were conditioned on a particular understanding of state law. *Jurek* simply had not upheld the Texas death penalty statute in all circumstances. In fact, five Members

of the Court rejected the *Franklin* plurality's reliance on *Jurek* and disagreed with the plurality's suggestion that a State constitutionally could limit the "ability of the sentencing authority to give *effect* to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense." 487 U. S., at 183–185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment) (emphasis added); *id.*, at 194–200 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting). See also *Penry* v. *Lynaugh*, 492 U. S., at 320–321 ("[B]oth the concurrence and the dissent [in *Franklin*] understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced").

The view of the five concurring and dissenting Justices that the facial review in *Jurek* did not decide the issue presented in *Franklin* is not surprising. After all, the same day we approved the Texas death penalty statute in *Jurek*, we also approved the death penalty statutes of Georgia and Florida. See *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion); *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (joint opinion). Yet after *Gregg* and *Proffitt* and prior to *Franklin*, we held unconstitutional specific applications of the same Georgia and Florida statutes we earlier had approved. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (vague and overly broad construction of aggravating factor rendered death sentence unconstitutional); *Hitchcock* v. *Dugger*, *supra* (holding it unconstitutional to restrict jury's consideration of mitigating factors to those enumerated in the statute). Despite this majority view of *Jurek* and the Texas death penalty statute, the Court today relies on the minority view in *Franklin*. It goes so far as to note with approval the minority position that "*Jurek* foreclosed the defendant's argument that the jury was still entitled to cast an 'independent' vote against the death penalty even if it answered yes to the special is-

sues." *Ante*, at 364 (citing *Franklin*, *supra*, at 180). This reading of *Franklin* turns *stare decisis* on its head.

Although the majority of Justices in *Franklin* did not accept the contention that the State constitutionally could limit a sentencer's ability to give effect to mitigating evidence, two Justices concurred in the judgment because they believed that on the facts of that case the State had not limited the effect the evidence could be given. 487 U. S., at 185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment). Thus, resolution of the issue was left open. The following Term, however, the Court squarely addressed the constitutionality of limiting the effect a Texas jury could give to relevant mitigating evidence, and contrary to the majority opinion today, we plainly held that the Texas special issues violated the Eighth Amendment to the extent they prevented the jury from giving full consideration *and* effect to a defendant's relevant mitigating evidence. *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

Penry was in no way limited to evidence that is only aggravating under the "future dangerousness" issue. We stated there that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.*, at 319. That we meant "full effect" is evident from the remainder of our discussion. We first determined that Penry's evidence of mental retardation and his abused childhood was relevant to the question whether he acted deliberately under the first special issue. *Id.*, at 322. But having *some* relevance to an issue was not sufficient, and the problem was not, as the Court today suggests, see *ante*, at 364–365, simply that no jury instruction defined the term "deliberately." Instead, we noted that the jury must be able to give effect to the evidence as it related to Penry's "[p]ersonal culpability," which "is not solely a function of a defendant's capacity to act 'deliberately.'" 492 U. S., at 322. The jury could not

give full effect to Penry's evidence under the first special issue because "deliberately" was not defined "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence *as it bears on his personal culpability.*" *Id.*, at 323 (emphasis added). That is, the evidence had relevance beyond the scope of the first issue. *Id.*, at 322.

We concluded that the second special issue, like the first, did not allow a jury to give effect to a mitigating aspect of mental retardation: the diminution of culpability. *Id.*, at 323–324. The Court today makes much of our finding that the "only" relevance of Penry's evidence to the second issue was as an aggravating factor, see *id.*, at 323. *Ante*, at 365. But in so doing, it takes our factual description of Penry's evidence as a "two-edged sword" out of context. The second special issue was not inadequate because the evidence worked only against Penry; it was inadequate because it did not allow the jury to give full effect to Penry's mitigating evidence. *Penry*, 492 U. S., at 323. Our discussion of the third special issue—whether the defendant's conduct was unreasonable in response to the provocation—also focused on the inability of a juror to express the view that Penry lacked "the moral culpability to be sentenced to death" in answering the question. *Id.*, at 324–325. The point of *Penry* is clear: A death sentence resulting from application of the Texas special issues cannot be upheld unless the jurors are able to consider fully a defendant's mitigating evidence. Accord, *id.*, at 355 (SCALIA, J., concurring in part and dissenting in part) (The Court today holds that "the constitutionality turns on whether the [special] questions allow mitigating factors not only to be considered . . . , *but also to be given effect in all possible ways, including ways that the questions do not permit*").

C

Our recent cases are not to the contrary. In *Boyde* v. *California*, 494 U. S. 370 (1990), for example, the Court relied on two straightforward propositions to reject petition-

er's claim that the California death penalty was unconstitutional. First, we rejected the argument that requiring the jury to weigh aggravating and mitigating factors, and then sentence petitioner accordingly, violated the requirement of individualized sentencing. The petitioner in *Boyde* did not allege that the instruction interfered with the jury's consideration of mitigating evidence; instead, he essentially argued for the constitutional right to an instruction on jury nullification. See *id.*, at 377. We also addressed (and rejected) petitioner's challenge to a "catch-all" instruction that told the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*, at 374 (internal quotation marks omitted). We reiterated our long-time understanding that the "Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," *id.*, at 377–378, but found that the challenged instruction did not "restrict impermissibly [the] jury's consideration of relevant evidence," *id.*, at 378. Accord, *id.*, at 382–384. Our holding in *Boyde* did not constrict or limit our prior cases on the requirements of the Eighth Amendment.

The Court's reliance on *Saffle* v. *Parks*, 494 U. S. 484 (1990), also is misplaced. In *Saffle*, the only issue was whether it would be a new rule under the standards of *Teague* v. *Lane*, 489 U. S. 288 (1989), for a defendant to be entitled to an instruction allowing the jury to decline to impose the death penalty based on mere sympathy. We held that it would. 494 U. S., at 489. To be sure, there is language in *Saffle* suggesting that a State may limit a sentencer's consideration of mitigating evidence so long as the sentencer may give some effect to the evidence. See, *e. g.*, *id.*, at 490–491. But to the extent *Saffle* suggests anything more than that the State may prevent the sentencer from declining to impose the death penalty based on mere sympathy, the language is dictum and cannot be construed as over-

ruling 17 years of precedent. Limiting a sentencer's discretion to react based on unfocused sympathy is not the equivalent of preventing a sentencer from giving a "reasoned *moral* response," *id.*, at 493 (internal quotation marks omitted), based on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *id.*, at 489 (internal quotation marks omitted). This Court has reaffirmed continually since 1976 that the Constitution prohibits the latter limitation.

* * *

"[Y]outh is more than a chronological fact." *Eddings*, 455 U. S., at 115. The emotional and mental immaturity of young people may cause them to respond to events in ways that an adult would not. Because the jurors in Johnson's case could not give effect to this aspect of Johnson's youth, I would vacate Johnson's sentence and remand for resentencing.

Syllabus

GODINEZ, WARDEN *v.* MORAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–725. Argued April 21, 1993—Decided June 24, 1993

After respondent Moran pleaded not guilty to three counts of first-degree murder and two psychiatrists concluded that he was competent to stand trial, he informed the Nevada trial court that he wished to discharge his attorneys and change his pleas to guilty. The court found that Moran understood "the nature of the criminal charges against him" and was "able to assist in his defense"; that he was "knowingly and intelligently" waiving his right to the assistance of counsel; and that his guilty pleas were "freely and voluntarily" given. He was ultimately sentenced to death. When Moran subsequently sought state postconviction relief, the trial court held an evidentiary hearing before rejecting his claim that he was mentally incompetent to represent himself, and the State Supreme Court dismissed his appeal. A Federal District Court denied his petition for a writ of habeas corpus, but the Court of Appeals reversed. It concluded that due process required the trial court to hold a hearing to evaluate and determine Moran's competency before it accepted his decisions to waive counsel and plead guilty. It also found that the postconviction hearing did not cure the error, holding that the trial court's ruling was premised on the wrong legal standard because competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. The court reasoned that, while a defendant is competent to stand trial if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel, he is competent to waive counsel or plead guilty only if he has the capacity for reasoned choice among the available alternatives.

Held: The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial: whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him," *Dusky* v. *United States*, 362 U. S. 402 *(per curiam)*. There is no reason for the competency standard for either of those decisions to be higher than that for standing trial. The decision to plead guilty, though profound, is no more complicated than the sum total of decisions that a defendant may have to make during the course of a trial, such as

Syllabus

whether to testify, whether to waive a jury trial, and whether to cross-examine witnesses for the prosecution. Nor does the decision to waive counsel require an appreciably higher level of mental functioning than the decision to waive other constitutional rights. A higher standard is not necessary in order to ensure that a defendant is competent to represent himself, because the ability to do so has no bearing upon his competence to *choose* self-representation, *Faretta* v. *California*, 422 U. S. 806, 836. When, in *Westbrook* v. *Arizona*, 384 U. S. 150 *(per curiam)*, this Court vacated a lower court ruling because there had been no "hearing or inquiry into the issue of [the petitioner's] competence to waive his constitutional right to the assistance of counsel," it did not mean to suggest that the *Dusky* formulation is not a high enough standard in cases in which the defendant seeks to waive counsel. Rather, the "competence to waive" language was simply a shorthand for the "intelligent and competent waiver" requirement of *Johnson* v. *Zerbst*, 304 U. S. 458, 468. Thus, *Westbrook* stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted. While States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose them. Pp. 396–402.

972 F. 2d 263, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SOUTER, JJ., joined, and in Parts I, II–B, and III of which SCALIA and KENNEDY, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 402. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 409.

David F. Sarnowski, Chief Deputy Attorney General of Nevada, argued the cause for petitioner. With him on the brief were *Frankie Sue Del Papa*, Attorney General, and *Brooke A. Nielsen*, Assistant Attorney General.

Amy L. Wax argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Keeney*, and *Joel M. Gershowitz*.

Cal J. Potter III, by appointment of the Court, 506 U. S. 1046, argued the cause for respondent. With him on the brief was *Edward M. Chikofsky.**

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.

I

On August 2, 1984, in the early hours of the morning, respondent entered the Red Pearl Saloon in Las Vegas, Nevada, and shot the bartender and a patron four times each with an automatic pistol. He then walked behind the bar and removed the cash register. Nine days later, respondent arrived at the apartment of his former wife and opened fire on her; five of his seven shots hit their target. Respondent then shot himself in the abdomen and attempted, without success, to slit his wrists. Of the four victims of respondent's gunshots, only respondent himself survived. On August 13, respondent summoned police to his hospital bed and confessed to the killings.

After respondent pleaded not guilty to three counts of first-degree murder, the trial court ordered that he be examined by a pair of psychiatrists, both of whom concluded that he was competent to stand trial.[1] The State thereafter an-

**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro, Diann Y. Rust-Tierney, John A. Powell*, and *Bruce J. Winick;* for the American Psychiatric Association et al. by *James W. Ellis* and *Barbara E. Bergman;* and for the National Association of Criminal Defense Lawyers by *Jon May.*

[1] One of the psychiatrists stated that there was "not the slightest doubt" that respondent was "in full control of his faculties" insofar as he had the "ability to aid counsel, assist in his own defense, recall evidence and . . .

nounced its intention to seek the death penalty. On November 28, 1984, 2½ months after the psychiatric evaluations, respondent again appeared before the trial court. At this time respondent informed the court that he wished to discharge his attorneys and change his pleas to guilty. The reason for the request, according to respondent, was to prevent the presentation of mitigating evidence at his sentencing.

On the basis of the psychiatric reports, the trial court found that respondent

> "is competent in that he knew the nature and quality of his acts, had the capacity to determine right from wrong; that he understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter; that he knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney." App. 21.

The court advised respondent that he had a right both to the assistance of counsel and to self-representation, warned him of the "dangers and disadvantages" of self-representation, *id.*, at 22, inquired into his understanding of the proceedings and his awareness of his rights, and asked why he had chosen to represent himself. It then accepted respondent's waiver of counsel. The court also accepted respondent's guilty pleas, but not before it had determined that respondent was not pleading guilty in response to threats or promises, that he understood the nature of the charges against him and the consequences of pleading guilty, that he was aware of the

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give testimony if called upon to do so." App. 8. The other psychiatrist believed that respondent was "knowledgeable of the charges being made against him"; that he had the ability to "assist his attorney, in his own defense, if he so desire[d]"; and that he was "fully cognizant of the penalties if convicted." *Id.*, at 17.

rights he was giving up, and that there was a factual basis for the pleas. The trial court explicitly found that respondent was "knowingly and intelligently" waiving his right to the assistance of counsel, *ibid.*, and that his guilty pleas were "freely and voluntarily" given, *id.*, at 64.[2]

On January 21, 1985, a three-judge court sentenced respondent to death for each of the murders. The Supreme Court of Nevada affirmed respondent's sentences for the Red Pearl Saloon murders, but reversed his sentence for the murder of his ex-wife and remanded for imposition of a life sentence without the possibility of parole. *Moran* v. *State*, 103 Nev. 138, 734 P. 2d 712 (1987).

On July 30, 1987, respondent filed a petition for post-conviction relief in state court. Following an evidentiary hearing, the trial court rejected respondent's claim that he was "mentally incompetent to represent himself," concluding that "the record clearly shows that he was examined by two psychiatrists both of whom declared [him] competent." App. to Pet. for Cert. D–8. The Supreme Court of Nevada dismissed respondent's appeal, *Moran* v. *Warden*, 105 Nev. 1041, 810 P. 2d 335, and we denied certiorari, 493 U. S. 874 (1989).

Respondent then filed a habeas petition in the United States District Court for the District of Nevada. The District Court denied the petition, but the Ninth Circuit reversed. 972 F. 2d 263 (1992). The Court of Appeals concluded that the "record in this case" should have led the trial court to "entertai[n] a good faith doubt about [respondent's] competency to make a voluntary, knowing, and intelligent

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[2] During the course of this lengthy exchange, the trial court asked respondent whether he was under the influence of drugs or alcohol, and respondent answered as follows: "Just what they give me in, you know, medications." *Id.*, at 33. The court made no further inquiry. The "medications" to which respondent referred had been prescribed to control his seizures, which were a byproduct of his cocaine use. See App. to Pet. for Cert. D–4.

waiver of constitutional rights," *id.*, at 265,[3] and that the Due Process Clause therefore "required the court to hold a hearing to evaluate and determine [respondent's] competency . . . before it accepted his decision to discharge counsel and change his pleas," *ibid.* Rejecting petitioner's argument that the trial court's error was "cured by the postconviction hearing," *ibid.*, and that the competency determination that followed the hearing was entitled to deference under 28 U. S. C. § 2254(d), the Court of Appeals held that "the state court's postconviction ruling was premised on the wrong legal standard of competency," 972 F. 2d, at 266. "Competency to waive constitutional rights," according to the Court of Appeals, "requires a higher level of mental functioning than that required to stand trial"; while a defendant is competent to stand trial if he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel," a defendant is competent to waive counsel or plead guilty only if he has "the capacity for 'reasoned choice' among the alternatives available to him." *Ibid.* The Court of Appeals determined that the trial court had "erroneously applied the standard for evaluating competency to stand trial, instead of the correct 'reasoned choice' standard," *id.*, at 266–267, and further concluded that when examined "in light of the correct legal standard," the record did not support a finding that respondent was "mentally capable of the reasoned choice required for a valid waiver of constitutional rights," *id.*, at 267.[4] The Court of Appeals accordingly in-

[3] The specific features of the record upon which the Court of Appeals relied were respondent's suicide attempt; his desire to discharge his attorneys so as to prevent the presentation of mitigating evidence at sentencing; his "monosyllabic" responses to the trial court's questions; and the fact that he was on medication at the time he sought to waive his right to counsel and plead guilty. 972 F. 2d, at 265.

[4] In holding that respondent was not competent to waive his constitutional rights, the court placed heavy emphasis on the fact that respondent was on medication at the time he sought to discharge his attorneys and plead guilty. See *id.*, at 268.

structed the District Court to issue the writ of habeas corpus within 60 days, "unless the state court allows [respondent] to withdraw his guilty pleas, enter new pleas, and proceed to trial with the assistance of counsel." *Id.*, at 268.

Whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial is a question that has divided the Federal Courts of Appeals[5] and state courts of last re-

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[5] While the Ninth Circuit and the District of Columbia Circuit, see *United States* v. *Masthers*, 176 U. S. App. D. C. 242, 247, 539 F. 2d 721, 726 (1976), have employed the "reasoned choice" standard for guilty pleas, every other Circuit that has considered the issue has determined that the competency standard for pleading guilty is identical to the competency standard for standing trial. See *Allard* v. *Helgemoe*, 572 F. 2d 1, 3–6 (CA1), cert. denied, 439 U. S. 858 (1978); *United States* v. *Valentino*, 283 F. 2d 634, 635 (CA2 1960) *(per curiam)*; *United States ex rel. McGough* v. *Hewitt*, 528 F. 2d 339, 342, n. 2 (CA3 1975); *Shaw* v. *Martin*, 733 F. 2d 304, 314 (CA4), cert. denied, 469 U. S. 873 (1984); *Malinauskas* v. *United States*, 505 F. 2d 649, 654 (CA5 1974); *United States* v. *Harlan*, 480 F. 2d 515, 517 (CA6), cert. denied, 414 U. S. 1006 (1973); *United States ex rel. Heral* v. *Franzen*, 667 F. 2d 633, 638 (CA7 1981); *White Hawk* v. *Solem*, 693 F. 2d 825, 829–830, n. 7 (CA8 1982), cert. denied, 460 U. S. 1054 (1983); *Wolf* v. *United States*, 430 F. 2d 443, 444 (CA10 1970); *United States* v. *Simmons*, 961 F. 2d 183, 187 (CA11 1992), cert. denied, 507 U. S. 989 (1993). Three of those same Circuits, however, have indicated that the competency standard for waiving the right to counsel is "vaguely higher" than the competency standard for standing trial, see *United States ex rel. Konigsberg* v. *Vincent*, 526 F. 2d 131, 133 (CA2 1975), cert. denied, 426 U. S. 937 (1976); *United States* v. *McDowell*, 814 F. 2d 245, 250 (CA6), cert. denied, 484 U. S. 980 (1987); *Blackmon* v. *Armontrout*, 875 F. 2d 164, 166 (CA8), cert. denied, 493 U. S. 939 (1989), and one of them has stated that the two standards "may not always be coterminous," *United States* v. *Campbell*, 874 F. 2d 838, 846 (CA1 1989). Only the Ninth Circuit applies the "reasoned choice" standard to waivers of counsel, and only the Seventh Circuit, see *United States* v. *Clark*, 943 F. 2d 775, 782 (1991), cert. pending, No. 92–6439, has held that the competency standard for waiving counsel is identical to the competency standard for standing trial. The Fourth Circuit has expressed the view that the two standards are "closely linked." *United States* v. *McGinnis*, 384 F. 2d 875, 877 (1967) *(per curiam)*, cert. denied, 390 U. S. 990 (1968).

sort.[6] We granted certiorari to resolve the conflict. 506 U. S. 1033 (1992).

II

A criminal defendant may not be tried unless he is competent, *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966), and he may not waive his right to counsel or plead guilty unless he does so "competently and intelligently," *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938); accord, *Brady* v. *United States*, 397 U. S. 742, 758 (1970). In *Dusky* v. *United States*, 362 U. S. 402 (1960) *(per curiam)*, we held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Ibid.* (internal quotation marks omitted). Accord, *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"). While we have described the standard for competence to stand trial, however, we have never expressly articulated a standard for competence to plead guilty or to waive the right to the assistance of counsel.

Relying in large part upon our decision in *Westbrook* v. *Arizona*, 384 U. S. 150 (1966) *(per curiam)*, the Ninth Circuit adheres to the view that the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. See *Sieling* v. *Eyman*, 478 F. 2d 211, 214–215 (1973) (first Ninth Circuit

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[6] Compare, *e. g.*, *State* v. *Sims*, 118 Ariz. 210, 215, 575 P. 2d 1236, 1241 (1978) (heightened standard for guilty plea); and *Pickens* v. *State*, 96 Wis. 2d 549, 567–568, 292 N. W. 2d 601, 610–611 (1980) (heightened standard for waiver of counsel), with *People* v. *Heral*, 62 Ill. 2d 329, 334, 342 N. E. 2d 34, 37 (1976) (identical standard for pleading guilty and standing trial); and *People* v. *Reason*, 37 N. Y. 2d 351, 353–354, 334 N. E. 2d 572, 574 (1975) (identical standard for waiving counsel and standing trial).

decision applying heightened standard). In *Westbrook*, a two-paragraph *per curiam* opinion, we vacated the lower court's judgment affirming the petitioner's conviction, because there had been "a hearing on the issue of [the petitioner's] competence to stand trial," but "no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel." 384 U. S., at 150. The Ninth Circuit has reasoned that the "clear implication" of *Westbrook* is that the *Dusky* formulation is not "a high enough standard" for determining whether a defendant is competent to waive a constitutional right. *Sieling, supra*, at 214.[7] We think the Ninth Circuit has read too much into *Westbrook*, and we think it errs in applying two different competency standards.[8]

A

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for "reasoned choice" among the alternatives available to him. How this standard is different from (much less higher than) the *Dusky* standard—whether the defendant has a "rational understanding" of the proceedings—is not readily apparent to us. In fact, respondent himself opposed certiorari on the ground that the difference between the two standards is merely one of "terminology," Brief in Opposition 4, and he devotes little space in his brief on the merits to a defense of the Ninth Circuit's standard, see, *e. g.*, Brief for

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[7] A criminal defendant waives three constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969).

[8] Although this case comes to us by way of federal habeas corpus, we do not dispose of it on the ground that the heightened competency standard is a "new rule" for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989), because petitioner did not raise a *Teague* defense in the lower courts or in his petition for certiorari. See *Parke* v. *Raley*, 506 U. S. 20, 26 (1992); *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990).

Respondent 17–18, 27, 32; see also Tr. of Oral Arg. 33 ("Due process does not require [a] higher standard, [it] requires a separate inquiry").[9] But even assuming that there is some meaningful distinction between the capacity for "reasoned choice" and a "rational understanding" of the proceedings, we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.

We begin with the guilty plea. A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination," *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," *ibid.*; and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers," *ibid.*, by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, *all* criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of

[9] We have used the phrase "rational choice" in describing the competence necessary to withdraw a certiorari petition, *Rees* v. *Peyton*, 384 U. S. 312, 314 (1966) *(per curiam)*, but there is no indication in that opinion that the phrase means something different from "rational understanding."

time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.

Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Respondent suggests that a higher competency standard is necessary because a defendant who represents himself "'must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.'" Brief for Respondent 26 (quoting Silten & Tullis, Mental Competency in Criminal Proceedings, 28 Hastings L. J. 1053, 1068 (1977)). Accord, Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 10–12. But this argument has a flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.[10] In *Faretta* v. *California*, 422 U. S. 806 (1975), we

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[10] It is for this reason that the dissent's reliance on *Massey* v. *Moore*, 348 U. S. 105 (1954), is misplaced. When we said in *Massey* that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel," *id.*, at 108, we were answering a question that is quite different from the question presented in this case. Prior to our decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the appointment of counsel was required only in those state prosecutions in which "special circumstances" were present, see *id.*, at 350–351 (Harlan, J., concurring), and the question in *Massey* was whether a finding that a defendant is competent to stand trial compels a conclusion that there are no "special circumstances" justifying the appointment of counsel. The question here is not whether a defendant who is competent to stand trial has no right to have counsel appointed; it is

held that a defendant choosing self-representation must do so "competently and intelligently," *id.*, at 835, but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, *id.*, at 836, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," *id.*, at 834. Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," *ibid.*, a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.[11]

B

A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. *Parke* v. *Raley*, 506 U. S. 20, 28–29 (1992) (guilty plea); *Faretta*, *supra*, at 835 (waiver of counsel). In this

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whether such a defendant is competent to waive the right to counsel that (after *Gideon*) he under all circumstances has.

[11] We note also that the prohibition against the trial of incompetent defendants dates back at least to the time of Blackstone, see *Medina* v. *California*, 505 U. S. 437, 446 (1992); *Drope* v. *Missouri*, 420 U. S. 162, 171–172 (1975); *Youtsey* v. *United States*, 97 F. 937, 940 (CA6 1899) (collecting "common law authorities"), and that "[b]y the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime," *Faretta* v. *California*, 422 U. S., at 823; accord, *id.*, at 850 (BLACKMUN, J., dissenting) ("self-representation was common, if not required, in 18th century English and American prosecutions"). It would therefore be "difficult to say that a standard which was designed to determine whether a defendant was capable of defending himself" is "inadequate when he chooses to conduct his own defense." *People* v. *Reason*, 37 N. Y. 2d, at 354, 334 N. E. 2d, at 574.

sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*.[12]

This two-part inquiry[13] is what we had in mind in *Westbrook*. When we distinguished between "competence to stand trial" and "competence to waive [the] constitutional right to the assistance of counsel," 384 U. S., at 150, we were using "competence to waive" as a shorthand for the "intelligent and competent waiver" requirement of *Johnson* v. *Zerbst*. This much is clear from the fact that we quoted that very language from *Zerbst* immediately after noting that the trial court had not determined whether the petitioner was competent to waive his right to counsel. See 384 U. S., at 150 (" 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused' ") (quoting *Johnson* v. *Zerbst*, 304 U. S., at 465). Thus, *Westbrook* stands only for the unremarkable proposi-

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[12] The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. See *Drope* v. *Missouri*, *supra*, at 171 (defendant is incompetent if he "lacks the *capacity* to understand the nature and object of the proceedings against him") (emphasis added). The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced. See *Faretta* v. *California*, *supra*, at 835 (defendant waiving counsel must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open' ") (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942)); *Boykin* v. *Alabama*, 395 U. S., at 244 (defendant pleading guilty must have "a full understanding of what the plea connotes and of its consequence").

[13] We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence. See *Drope* v. *Missouri*, *supra*, at 180–181; *Pate* v. *Robinson*, 383 U. S. 375, 385 (1966).

tion that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.[14]

III

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements. Cf. *Medina* v. *California*, 505 U. S. 437, 446–453 (1992). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

I am in full agreement with the Court's decision that the competency standard for pleading guilty and waiving the right to counsel is the same as the test of competency to stand trial. As I have some reservations about one part of the Court's opinion and take a somewhat different path to reach my conclusion, it is appropriate to make some further observations.

The Court compares the types of decisions made by one who goes to trial with the decisions required to plead guilty and waive the right to counsel. This comparison seems to suggest that there may have been a heightened standard of

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[14] In this case the trial court explicitly found both that respondent was competent and that his waivers were knowing and voluntary. See *supra*, at 392–393.

competency required by the Due Process Clause if the decisions were not equivalent. I have serious doubts about that proposition. In discussing the standard for a criminal defendant's competency to make decisions affecting his case, we should not confuse the content of the standard with the occasions for its application.

We must leave aside in this case any question whether a defendant is absolved of criminal responsibility due to his mental state at the time he committed criminal acts and any later question about whether the defendant has the minimum competence necessary to undergo his sentence. What is at issue here is whether the defendant has sufficient competence to take part in a criminal proceeding and to make the decisions throughout its course. This is not to imply that mental competence is the only aspect of a defendant's state of mind that is relevant during criminal proceedings. Whether the defendant has made a knowing, intelligent, and voluntary decision to make certain fundamental choices during the course of criminal proceedings is another subject of judicial inquiry. That both questions might be implicated at any given point, however, does not mean that the inquiries cease to be discrete. And as it comes to us, this case involves only the standard for determining competency.

This Court set forth the standard for competency to stand trial in *Dusky* v. *United States*, 362 U. S. 402 (1960) *(per curiam):* "[T]he 'test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Ibid.* In my view, both the Court of Appeals and respondent read "competency to stand trial" in too narrow a fashion. We have not suggested that the *Dusky* competency standard applies during the course of, but not before, trial. Instead, that standard is applicable from the time of arraignment through the return of a verdict. Although the *Dusky* standard refers to "ability to consult

with [a] lawyer," the crucial component of the inquiry is the defendant's possession of "a reasonable degree of rational understanding." In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify. The possibility that consultation will occur is not required for the standard to serve its purpose. If a defendant elects to stand trial and to take the foolish course of acting as his own counsel, the law does not for that reason require any added degree of competence. See *ante*, at 399–400, n. 10.

The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings. That was never the rule at common law, and it would take some extraordinary showing of the inadequacy of a single standard of competency for us to require States to employ heightened standards. See *Medina* v. *California*, 505 U. S. 437, 446–447 (1992). Indeed, we should only overturn Nevada's use of a single standard if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Ibid.* (quoting *Patterson* v. *New York*, 432 U. S. 197, 202 (1977)).

The historical treatment of competency that supports Nevada's single standard has its roots in English common law. Writing in the 18th century, Blackstone described the effect of a defendant's incompetence on criminal proceedings:

> "[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?" 4 W. Blackstone, Commentaries *24.

Accord, 1 M. Hale, Pleas of the Crown *34–*35.

Blackstone drew no distinction between madness for purposes of pleading and madness for purposes of going to trial. An English case arising in the Crown Court in 1865 indicates that a single standard was applied to assess competency at the time of arraignment, the time of pleading, and throughout the course of trial. See *Regina* v. *Southey*, 4 Fos. & Fin. 864, 872, n. a, 176 Eng. Rep. 825, 828, n. a (N. P. 1865) ("Assuming the prisoner to be insane at the time of arraignment, he cannot be tried *at all*, with or without counsel, for, even assuming that he has appointed counsel at a time when he was sane, it is not fit that he should be tried, as he cannot understand the evidence, nor the proceedings, and so is unable to instruct counsel, or to withdraw his authority if he acts improperly, as a prisoner may always do"); *id.*, at 877, n. a, 176 Eng. Rep., at 831, n. a ("[I]f [the defendant] be so insane as not to understand the nature of the proceedings, he cannot plead").

A number of 19th-century American cases also referred to insanity in a manner that suggested there was a single standard by which competency was to be assessed throughout legal proceedings. See, *e. g.*, *Underwood* v. *People*, 32 Mich. 1, 3 (1875) ("[I]nsanity, when discovered, was held at common law to bar any further steps against a prisoner, at whatever stage of the proceedings"); *Crocker* v. *State*, 60 Wis. 553, 556, 19 N. W. 435, 436 (1884) ("At common law, if a person, after committing a crime, became insane, he was not arraigned during his insanity, but was remitted to prison until such incapacity was removed. The same was true where he became insane after his plea of not guilty and before trial"); *State* v. *Reed*, 41 La. Ann. 581, 582, 7 So. 132 (1889) ("It is elementary that a man cannot plead, or be tried, or convicted, or sentenced, while in a state of insanity"). See also 2 J. Bishop, Commentaries on Law of Criminal Procedure §§ 664, 667 (2d ed. 1872) ("[A] prisoner cannot be tried, sentenced, or punished" unless he is "mentally competent to make a rational defense").

Other American cases describe the standard by which competency is to be measured in a way that supports the idea that a single standard, parallel to that articulated in *Dusky*, is applied no matter at what point during legal proceedings a competency question should arise. For example, in *Freeman* v. *People*, 4 Denio 2 (N. Y. 1847), it was held: "If . . . a person arraigned for a crime, is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defence in a rational manner, he is, for the purpose of being tried, to be deemed sane." *Id.*, at 24–25. Because the competency question was posed in *Freeman* at the time the defendant was to be arraigned, *id.*, at 19, the *Freeman* court's conception of competency to stand trial was that of a single standard to be applied throughout.

An even more explicit recitation of this common-law principle is found in *Hunt* v. *State*, 27 So. 2d 186 (Ala. 1946). In the course of the opinion in that case, there was a discussion of the common-law rule regarding a defendant's competency to take part in legal proceedings:

> "The rule at common law . . . is that if at any time while criminal proceedings are pending against a person accused of a crime, the trial court either from observation or upon suggestion of counsel has facts brought to his attention which raise a doubt of the sanity of defendant, the question should be settled before further steps are taken. . . . The broad question to be determined then is whether the defendant is capable of understanding the proceedings and of making his defense, and whether he may have a full, fair and impartial trial." *Id.*, at 191 (citation omitted).

At common law, therefore, no attempt was made to apply different competency standards to different stages of criminal proceedings or to the variety of decisions that a defend-

ant must make during the course of those proceedings. See *Commonwealth* v. *Woelfel*, 88 S. W. 1061, 1062 (Ky. 1905); *Jordan* v. *State*, 135 S. W. 327, 328–329 (Tenn. 1911); *State* v. *Seminary*, 115 So. 370, 371–372 (La. 1927); *State ex rel. Townsend* v. *Bushong*, 146 Ohio St. 271, 272, 65 N. E. 2d 407, 408 (1946) *(per curiam)*; *Moss* v. *Hunter*, 167 F. 2d 683, 684–685 (CA10 1948). Commentators have agreed that the common-law standard of competency to stand trial, which parallels the *Dusky* standard, has been applied throughout criminal proceedings, not just to the formal trial. See H. Weihofen, Mental Disorder as a Criminal Defense 428–429, 431 (1954) ("It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense"); S. Brakel, J. Parry, and A. Weiner, The Mentally Disabled and the Law 695–696 (3d ed. 1985) ("It has traditionally been presumed that competency to stand trial means competency to participate in all phases of the trial process, including such pretrial activities as deciding how to plead, participating in plea bargaining, and deciding whether to assert or waive the right to counsel").

That the common law did not adopt heightened competency standards is readily understood when one considers the difficulties that would be associated with more than one standard. The standard applicable at a given point in a trial could be difficult to ascertain. For instance, if a defendant decides to change his plea to guilty after a trial has commenced, one court might apply the competency standard for undergoing trial while another court might use the standard for pleading guilty. In addition, the subtle nuances among different standards are likely to be difficult to differentiate, as evidenced by the lack of any clear distinction between a "rational understanding" and a "reasoned choice" in this case. See *ante*, at 398.

It is true, of course, that if a defendant stands trial instead of pleading guilty, there will be more occasions for the trial court to observe the condition of the defendant to determine his mental competence. Trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant's competence. See *Drope* v. *Missouri*, 420 U. S. 162, 180–181 (1975). The standard by which competency is assessed, however, does not change. Respondent's counsel conceded as much during oral argument, making no attempt to defend the contrary position of the Court of Appeals. See, *e. g.*, Tr. of Oral Arg. 22 ("This is not a case of heightened standards"); *id.*, at 31 ("We didn't argue a heightened standard. We did not argue a heightened standard to the Ninth Circuit, nor did we necessarily argue a heightened standard at any juncture in this case"); *id.*, at 33 ("Due process does not require this higher standard, but requires a separate inquiry").

A single standard of competency to be applied throughout criminal proceedings does not offend any "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U. S., at 446. Nothing in our case law compels a contrary conclusion, and adoption of a rule setting out varying competency standards for each decision and stage of a criminal proceeding would disrupt the orderly course of trial and, from the standpoint of all parties, prove unworkable both at trial and on appellate review.

I would avoid the difficult comparisons engaged in by the Court. In my view, due process does not preclude Nevada's use of a single competency standard for all aspects of the criminal proceeding. Respondent's decision to plead guilty and his decision to waive counsel were grave choices for him to make, but as the Court demonstrates in Part II–B, there is a heightened standard, albeit not one concerned with competence, that must be met before a defendant is allowed to make those decisions.

With these observations, I concur in the judgment and in Parts I, II–B, and III of the Court's opinion.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Today, the majority holds that a standard of competence designed to measure a defendant's ability to consult with counsel and to assist in preparing his defense is constitutionally adequate to assess a defendant's competence to waive the right to counsel and represent himself. In so doing, the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness. I believe the majority's analysis is contrary to both common sense and longstanding case law. Therefore, I dissent.

I

As a preliminary matter, the circumstances under which respondent Richard Allan Moran waived his right to an attorney and pleaded guilty to capital murder bear elaboration. For, although the majority's exposition of the events is accurate, the most significant facts are omitted or relegated to footnotes.

In August 1984, after killing three people and wounding himself in an attempt to commit suicide, Moran was charged in a Nevada state court with three counts of capital murder. He pleaded not guilty to all charges, and the trial court ordered a psychiatric evaluation. At this stage, Moran's competence to represent himself was not at issue.

The two psychiatrists who examined him therefore focused solely upon his capacity to stand trial with the assistance of counsel. Dr. Jack A. Jurasky found Moran to be "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so." App. 8. Dr. Jurasky, however, did express some reservations, observing: "Psy-

chologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense." *Ibid.* Nevertheless, under the circumstances, Dr. Jurasky felt that Moran's depressed state of mind was not "necessarily a major consideration." *Ibid.* Dr. William D. O'Gorman also characterized Moran as "very depressed," remarking that he "showed much tearing in talking about the episodes that led up to his present incarceration, particularly in talking about his ex-wife." *Id.*, at 15–16. But Dr. O'Gorman ultimately concluded that Moran "is knowledgeable of the charges being made against him" and "can assist his attorney, in his own defense, if he so desires." *Id.*, at 17.

In November 1984, just three months after his suicide attempt, Moran appeared in court seeking to discharge his public defender, waive his right to counsel, and plead guilty to all three charges of capital murder. When asked to explain the dramatic change in his chosen course of action, Moran responded that he wished to represent himself because he opposed all efforts to mount a defense. His purpose, specifically, was to prevent the presentation of any mitigating evidence on his behalf at the sentencing phase of the proceeding. The trial judge inquired whether Moran was "presently under the influence of any drug or alcohol," and Moran replied: "Just what they give me in, you know, medications." *Id.*, at 33. Despite Moran's affirmative answer, the trial judge failed to question him further regarding the type, dosage, or effect of the "medications" to which he referred. Had the trial judge done so, he would have discovered that Moran was being administered simultaneously four different prescription drugs—phenobarbital, dilantin, inderal, and vistaril. Moran later testified to the numbing effect of these drugs, stating: "I guess I really didn't care about anything . . . . I wasn't very concerned about anything that

was going on . . . as far as the proceedings and everything were going." *Id.*, at 92.[1]

Disregarding the mounting evidence of Moran's disturbed mental state, the trial judge accepted Moran's waiver of counsel and guilty pleas after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers. In a string of affirmative responses, Moran purported to acknowledge that he knew the import of waiving his constitutional rights, that he understood the charges against him, and that he was, in fact, guilty of those charges. One part of this exchange, however, highlights the mechanical character of Moran's answers to the questions. When the trial judge asked him whether he killed his ex-wife "deliberately, with premeditation and malice aforethought," Moran unexpectedly responded: "No. I didn't do it—I mean, I wasn't looking to kill her, but she ended up dead." *Id.*, at 58. Instead of probing further, the trial judge simply repeated the question, inquiring again whether Moran had acted deliberately. Once again, Moran replied: "I don't know. I mean, I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it; you know what I mean?" *Id.*, at 59. Ignoring the ambiguity of Moran's responses, the trial judge reframed the question to elicit an affirmative answer, stating: "Well, I've previously explained to you what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration

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[1] Moran's medical records, read in conjunction with the Physician's Desk Reference (46 ed. 1992), corroborate his testimony concerning the medications he received and their impact upon him. The records show that Moran was administered dilantin, an antiepileptic medication that may cause confusion; inderal, a beta-blocker antiarrhythmic that may cause light-headedness, mental depression, hallucinations, disorientation, and short-term memory loss; and vistaril, a depressant that may cause drowsiness, tremors, and convulsions. App. 97–98.

for and against the proposed action. Did you do that?" This time, Moran responded: "Yes." *Ibid.*

It was only after prodding Moran through the plea colloquy in this manner that the trial judge concluded that he was competent to stand trial and that he voluntarily and intelligently had waived his right to counsel. Accordingly, Moran was allowed to plead guilty and appear without counsel at his sentencing hearing. Moran presented no defense, called no witness, and offered no mitigating evidence on his own behalf. Not surprisingly, he was sentenced to death.

II

It is axiomatic by now that criminal prosecution of an incompetent defendant offends the Due Process Clause of the Fourteenth Amendment. See *Medina* v. *California*, 505 U. S. 437 (1992); *Riggins* v. *Nevada*, 504 U. S. 127, 138 (1992) (KENNEDY, J., concurring); *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975); *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966). The majority does not deny this principle, nor does it dispute the standard that has been set for competence to stand trial with the assistance of counsel: whether the accused possesses "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U. S., at 171. Accord, *Dusky* v. *United States*, 362 U. S. 402 (1960). My disagreement with the majority turns, then, upon another standard—the one for assessing a defendant's competence to waive counsel and represent himself.

The majority "reject[s] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from)" the standard for competence to stand trial articulated in *Dusky* and *Drope*. *Ante*, at 398. But the standard for competence to stand trial is specifically designed to measure a defendant's ability to "consult with counsel" and to "assist in preparing his defense." A finding that a defendant is

competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist. The question is no longer whether the defendant can proceed with an attorney, but whether he can proceed alone and uncounseled. I do not believe we place an excessive burden upon a trial court by requiring it to conduct a specific inquiry into that question at the juncture when a defendant whose competency already has been questioned seeks to waive counsel and represent himself.

The majority concludes that there is no need for such a hearing because a defendant who is found competent to stand trial with the assistance of counsel is, *ipso facto*, competent to discharge counsel and represent himself. But the majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. The majority's monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose. See Bonnie, The Competence of Criminal Defendants: A Theoretical Reformulation, 10 Behav. Sci. & L. 291, 299 (1992); R. Roesch & S. Golding, Competency to Stand Trial 10–13 (1980). Consistent with this commonsense notion, our cases always have recognized that "a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." *Drope*, 420 U. S., at 176. See *Jackson* v. *Indiana*, 406 U. S. 715, 739 (1972). To this end, this Court has required competency evaluations to be specifically tailored to the context and purpose of a proceeding. See *Rees* v. *Peyton*, 384 U. S. 312, 314 (1966) (directing court "to determine [petitioner's] mental competence in the present posture of things").

In *Massey* v. *Moore*, 348 U. S. 105, 108 (1954), for example, the Court ruled that a defendant who had been found competent to stand trial with the assistance of counsel should have been given a hearing as to his competency to represent himself because "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."[2] And in *Westbrook* v. *Arizona*, 384 U. S. 150 (1966), the Court reiterated the requirement that the determination of a defendant's competency be tailored to the particular capacity in question, observing: "Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." See also *Medina*, 505 U. S., at 446–448 (distinguishing between a claim of incompetence and a plea of not guilty by reason of insanity); *Riggins*, 504 U. S., at 140–144 (KENNEDY, J., concurring) (distinguishing between functional competence and competence to stand trial).

Although the Court never has articulated explicitly the standard for determining competency to represent oneself, it has hinted at its contours. In *Rees* v. *Peyton*, *supra*, it required an evaluation of competence that was designed to measure the abilities necessary for a defendant to make a decision under analogous circumstances. In that case, a capital defendant who had filed a petition for certiorari ordered his attorney to withdraw the petition and forgo further legal proceedings. The petitioner's counsel advised the Court that he could not conscientiously do so without a psychiatric examination of his client because there was some doubt as to

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[2] The majority's attempt to distinguish *Massey* as a pre-*Gideon* v. *Wainwright*, 372 U. S. 335 (1963), case, *ante*, at 399–400, n. 10, is simply irrelevant. For, as the majority itself concedes, *Massey* stands only for the proposition that the two inquiries are different—competency to stand trial with the assistance of counsel is not equivalent to competency to proceed alone.

his client's mental competency. Under those circumstances, this Court directed the lower court to conduct an inquiry as to whether the defendant possessed the "capacity to appreciate his position and make a *rational choice* with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U. S., at 314 (emphasis added). Certainly the competency required for a capital defendant to proceed *without the advice of counsel* at trial or in plea negotiations should be no less than the competency required for a capital defendant to proceed *against the advice of counsel* to withdraw a petition for certiorari. The standard applied by the Ninth Circuit in this case—the "reasoned choice" standard—closely approximates the "rational choice" standard set forth in *Rees*.[3]

Disregarding the plain language of *Westbrook* and *Massey*, the majority in effect overrules those cases *sub silentio*.[4] From the constitutional right of self-representation established in *Faretta* v. *California*, 422 U. S. 806 (1975), the majority extrapolates that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose*

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[3] According to the majority, "there is no indication . . . that the phrase ['rational choice'] means something different from 'rational understanding.'" *Ante*, at 398, n. 9. What the majority fails to recognize is that, in the distinction between a defendant who possesses a "rational understanding" of the proceedings and one who is able to make a "rational choice," lies the difference between the capacity for passive and active involvement in the proceedings.

[4] According to the majority, "*Westbrook* stands only for the unremarkable proposition" that a determination of competence to stand trial is not sufficient to waive the right to counsel; "the waiver must also be intelligent and voluntary before it can be accepted." *Ante*, at 401–402. But the majority's attempt to transform a case about the competency to waive counsel into a case about the voluntariness of a waiver needlessly complicates this area of the law. Perhaps competence to waive rights is incorporated into a voluntariness inquiry, but there is no necessary link between the two concepts.

self-representation." *Ante*, at 400. But *Faretta* does not confer upon an *incompetent* defendant a constitutional right to conduct his own defense. Indeed, Faretta himself was "literate, competent, and understanding," and the record showed that "he was voluntarily exercising his informed free will." 422 U. S., at 835. "Although a defendant need not himself have the skill and experience of a lawyer," *Faretta*'s right of self-representation is confined to those who are able to choose it "competently and intelligently." *Ibid.* The *Faretta* Court was careful to emphasize that the record must establish that the defendant "'knows what he is doing and his choice is made with eyes open.'" *Ibid.*, quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942).

The majority asserts that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Ante*, at 399. But this assertion is simply incorrect. The majority's attempt to extricate the competence to waive the right to counsel from the competence to represent oneself is unavailing, because the former decision necessarily entails the latter. It is obvious that a defendant who waives counsel must represent himself. Even Moran, who pleaded guilty, was required to defend himself during the penalty phase of the proceedings. And a defendant who is utterly incapable of conducting his own defense cannot be considered "competent" to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered "competent" to make such a choice.

The record in this case gives rise to grave doubts regarding respondent Moran's ability to discharge counsel and represent himself. Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists' re-

ports supplied one explanation for Moran's self-destructive behavior: his deep depression. And Moran's own testimony suggested another: the fact that he was being administered simultaneously four different prescription medications. It has been recognized that such drugs often possess side effects that may "compromise the right of a medicated criminal defendant to receive a fair trial . . . by rendering him unable or unwilling to assist counsel." *Riggins*, 504 U. S., at 142 (KENNEDY, J., concurring). Moran's plea colloquy only augments the manifold causes for concern by suggesting that his waivers and his assent to the charges against him were not rendered in a truly voluntary and intelligent fashion. Upon this evidence, there can be no doubt that the trial judge should have conducted another competency evaluation to determine Moran's capacity to waive the right to counsel and represent himself, instead of relying upon the psychiatrists' reports that he was able to stand trial with the assistance of counsel.[5]

To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive "choice" of a person who was so deeply medicated and who might well have been severely mentally ill. I dissent.

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[5] Whether this same evidence implies that Moran's waiver of counsel and guilty pleas were also involuntary remains to be seen. Cf. *Miller* v. *Fenton*, 474 U. S. 104 (1985) (voluntariness is a mixed question of law and fact entitled to independent federal review).

Syllabus

UNITED STATES ET AL. *v.* EDGE BROADCASTING CO., T/A POWER 94

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92–486. Argued April 21, 1993—Decided June 25, 1993

Congress has enacted federal lottery legislation to assist States in their efforts to control this form of gambling. Among other things, the scheme generally prohibits the broadcast of any lottery advertisements, 18 U. S. C. § 1304, but allows broadcasters to advertise state-run lotteries on stations licensed to a State which conducts such lotteries, § 1307. This exemption was enacted to accommodate the operation of legally authorized state-run lotteries consistent with continued federal protection to nonlottery States' policies. North Carolina is a nonlottery State, while Virginia sponsors a lottery. Respondent broadcaster (Edge) owns and operates a radio station licensed by the Federal Communications Commission to serve a North Carolina community, and it broadcasts from near the Virginia-North Carolina border. Over 90% of its listeners are in Virginia, but the remaining listeners live in nine North Carolina counties. Wishing to broadcast Virginia lottery advertisements, Edge filed this action, alleging that, as applied to it, the restriction violated the First Amendment and the Equal Protection Clause. The District Court assessed the restriction under the four-factor test for commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566—(1) whether the speech concerns lawful activity and is not misleading and (2) whether the asserted governmental interest is substantial; and if so, (3) whether the regulation directly advances the asserted interest and (4) whether it is not more extensive than is necessary to serve the interest—concluding that the statutes, as applied to Edge, did not directly advance the asserted governmental interest. The Court of Appeals affirmed.

Held: The judgment is reversed.

956 F. 2d 263, reversed.

JUSTICE WHITE delivered the opinion of the Court as to all but Part III–D, concluding that the statutes regulate commercial speech in a manner that does not violate the First Amendment. Pp. 426–435, 436.

(a) Since the statutes are constitutional under *Central Hudson*, this Court will not consider the Government's argument that the Court need not proceed with a *Central Hudson* analysis because gambling implicates

no constitutionally protected right and the greater power to prohibit it necessarily includes the lesser power to ban its advertisement. This Court assumes that *Central Hudson*'s first factor is met. As to the second factor, the Government has a substantial interest in supporting the policy of nonlottery States and not interfering in the policy of lottery States. Pp. 426–427.

(b) The question raised by the third *Central Hudson* factor cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single entity, for even if it were not, there would remain the matter of a regulation's general application to others. Thus, the statutes' validity as applied to Edge, although relevant, is properly addressed under the fourth factor. The statutes directly advance the governmental interest at stake as required by the third factor. Rather than favoring lottery or nonlottery States, Congress chose to support nonlottery States' antigambling policy without unduly interfering with the policy of lottery States. Although Congress surely knew that stations in one State could be heard in another, it made a commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere, and that enforcing the restriction would insulate each station's listeners from lottery advertising and advance the governmental purpose in supporting North Carolina's gambling laws. Pp. 427–429.

(c) Under the fourth *Central Hudson* factor, the statutes are valid as applied to Edge. The validity of commercial speech restrictions should be judged by standards no more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 477–478; the fit between the restriction and the government interest need only be reasonable, *id.*, at 480. Here, the fit is reasonable. Allowing Edge to carry the lottery advertisements to North Carolina counties would be in derogation of the federal interest in supporting the State's antilottery laws and would permit Virginia's lottery laws to dictate what stations in a neighboring State may air. The restriction's validity is judged by the relation it bears to the general problem of accommodating both lottery and nonlottery States, not by the extent to which it furthers the Government's interest in an individual case. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 801. Nothing in *Edenfield* v. *Fane*, 507 U. S. 761, suggested that an individual could challenge a commercial speech regulation as applied only to himself or his own acts. Pp. 429–431.

(d) The courts below also erred in holding that the restriction as applied to Edge was ineffective and gave only remote support to the Government's

Syllabus

interest. The exclusion of gambling invitations from an estimated 11% of the radio listening time in the nine-county area could hardly be called "ineffective," "remote," or "conditional." See *Central Hudson, supra,* at 564, 569. Nor could it be called only "limited incremental support," *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 73, for the Goverment interest, or thought to furnish only speculative or marginal support. The restriction is not made ineffective by the fact that Virginia radio and television stations with lottery advertising can be heard in North Carolina. Many residents of the nine-county area will still be exposed to very few or no such advertisements. Moreover, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated. Pp. 431–435.

WHITE, J., delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts III–A and III–B, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Part III–C, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–D, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. SOUTER, J., filed an opinion concurring in part, in which KENNEDY, J., joined, *post,* p. 436. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 436.

Paul J. Larkin, Jr., argued the cause for petitioners. With him on the briefs were *Solicitor General Starr, Acting Solicitor General Bryson, Assistant Attorney General Gerson,* and *Deputy Solicitor General Roberts.*

Conrad M. Shumadine argued the cause for respondent. With him on the brief was *Walter D. Kelley, Jr.**

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*Briefs of *amici curiae* urging affirmance were filed for the Association of National Advertisers, Inc., et al. by *Burt Neuborne* and *Gilbert H. Weil;* and for the National Association of Broadcasters et al. by *P. Cameron DeVore, Marshall J. Nelson, John Kamp, Steven R. Shapiro, John A. Powell, Barbara W. Wall, Kenneth M. Vittor, Slade R. Metcalf, Richard E. Wiley, David P. Fleming, John F. Sturm, René P. Milam, Mark J. Prak, L. Stanley Paige, Bruce W. Sanford,* and *Henry S. Hoberman.*

JUSTICE WHITE delivered the opinion of the Court, except as to Part III–D.*

In this case we must decide whether federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery, are, as applied to respondent, consistent with the First Amendment.

I

While lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest, and have long engaged in legislative efforts to control this form of gambling. Congress has, since the early 19th century, sought to assist the States in controlling lotteries. See, *e. g.*, Act of Mar. 2, 1827, § 6, 4 Stat. 238; Act of July 27, 1868, § 13, 15 Stat. 196; Act of June 8, 1872, § 149, 17 Stat. 302. In 1876, Congress made it a crime to deposit in the mails any letters or circulars concerning lotteries, whether illegal or chartered by state legislatures. See Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90, codified at Rev. Stat. § 3894 (2d ed. 1878). This Court rejected a challenge to the 1876 Act on First Amendment grounds in *Ex parte Jackson*, 96 U. S. 727 (1878). In response to the persistence of lotteries, particularly the Louisiana Lottery, Congress closed a loophole allowing the advertisement of lotteries in newspapers in the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465, codified at Supp. to Rev. Stat. § 3894 (2d ed. 1891), and this Court upheld that Act against a First Amendment challenge in *In re Rapier*, 143

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*JUSTICE O'CONNOR joins Parts I, II, III–A, III–B, and IV of this opinion. JUSTICE SCALIA joins all but Part III–C of this opinion. JUSTICE KENNEDY joins Parts I, II, III–C, and IV of this opinion. JUSTICE SOUTER joins all but Parts III–A, III–B, and III–D of this opinion.

U. S. 110 (1892). When the Louisiana Lottery moved its operations to Honduras, Congress passed the Act of Mar. 2, 1895, 28 Stat. 963, 18 U. S. C. § 1301, which outlawed the transportation of lottery tickets in interstate or foreign commerce. This Court upheld the constitutionality of that Act against a claim that it exceeded Congress' power under the Commerce Clause in *Lottery Case*, 188 U. S. 321 (1903). This federal antilottery legislation remains in effect. See 18 U. S. C. §§ 1301, 1302.

After the advent of broadcasting, Congress extended the federal lottery control scheme by prohibiting, in § 316 of the Communications Act of 1934, 48 Stat. 1088, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U. S. C. § 1304, as amended by the Charity Games Advertising Clarification Act of 1988, Pub. L. 100–625, § 3(a)(4), 102 Stat. 3206.[1] In 1975, Congress amended the statutory scheme to allow newspapers and broadcasters to advertise state-run lotteries if the newspaper is published in or the broadcast station is licensed to a State which conducts a state-run lottery. See 18 U. S. C. § 1307 (1988 ed., Supp. III).[2] This exemption was

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[1] Title 18 U. S. C. § 1304 (1988 ed., Supp. III) provides:

"Broadcasting lottery information

"Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[2] Title 18 U. S. C. § 1307 (1988 ed. and Supp. III) provides in relevant part:

"Exceptions relating to certain advertisements and other information and to State-conducted lotteries

"(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

enacted "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S. Rep. No. 93–1404, p. 2 (1974). See also H. R. Rep. No. 93–1517, p. 5 (1974).

North Carolina does not sponsor a lottery, and participating in or advertising nonexempt raffles and lotteries is a crime under its statutes. N. C. Gen. Stat. §§ 14–289 and 14–291 (1986 and Supp. 1992). Virginia, on the other hand, has chosen to legalize lotteries under a state monopoly and has entered the marketplace vigorously.

Respondent, Edge Broadcasting Company (Edge), owns and operates a radio station licensed by the Federal Communications Commission (FCC) to Elizabeth City, North Carolina. This station, known as "Power 94," has the call letters WMYK–FM and broadcasts from Moyock, North Carolina, which is approximately three miles from the border between Virginia and North Carolina and considerably closer to Virginia than is Elizabeth City. Power 94 is one of 24 radio stations serving the Hampton Roads, Virginia, metropolitan area; 92.2% of its listening audience are Virginians; the rest, 7.8%, reside in the nine North Carolina counties served by

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"(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

"(A) contained in a publication published in that State or in a State which conducts such a lottery; or

"(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

"(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

"(A) conducted by a not-for-profit organization or a governmental organization; or

"(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

Power 94. Because Edge is licensed to serve a North Carolina community, the federal statute prohibits it from broadcasting advertisements for the Virginia lottery. Edge derives 95% of its advertising revenue from Virginia sources, and claims that it has lost large sums of money from its inability to carry Virginia lottery advertisements.

Edge entered federal court in the Eastern District of Virginia, seeking a declaratory judgment that, as applied to it, §§ 1304 and 1307, together with corresponding FCC regulations, violated the First Amendment to the Constitution and the Equal Protection Clause of the Fourteenth, as well as injunctive protection against the enforcement of those statutes and regulations.

The District Court recognized that Congress has greater latitude to regulate broadcasting than other forms of communication. App. to Pet. for Cert. 14a–15a. The District Court construed the statutes not to cover the broadcast of noncommercial information about lotteries, a construction that the Government did not oppose. With regard to the restriction on advertising, the District Court evaluated the statutes under the established four-factor test for commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980):

> "At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest."

Assuming that the advertising Edge wished to air would deal with the Virginia lottery, a legal activity, and would not be misleading, the court went on to hold that the second and

fourth *Central Hudson* factors were satisfied: the statutes were supported by a substantial governmental interest, and the restrictions were no more extensive than necessary to serve that interest, which was to discourage participating in lotteries in States that prohibited lotteries. The court held, however, that the statutes, as applied to Edge, did not directly advance the asserted governmental interest, failed the *Central Hudson* test in this respect, and hence could not be constitutionally applied to Edge. A divided Court of Appeals, in an unpublished *per curiam* opinion,[3] affirmed in all respects, also rejecting the Government's submission that the District Court had erred in judging the validity of the statutes on an "as applied" standard, that is, determining whether the statutes directly served the governmental interest in a substantial way solely on the effect of applying them to Edge. Judgt. order reported at 956 F. 2d 263 (CA4 1992).

Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable under our cases relating to the regulation of commercial speech, we granted certiorari. 506 U. S. 1032 (1992). We reverse.

II

The Government argues first that gambling implicates no constitutionally protected right, but rather falls within a category of activities normally considered to be "vices," and that the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement; it argues that we therefore need not proceed with a *Central Hudson* analysis. The Court of Appeals did not address this issue and neither do we, for the statutes are not unconstitutional under the standards of *Central Hudson* applied by the courts below.

[3] We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.

III

For most of this Nation's history, purely commercial advertising was not considered to implicate the constitutional protection of the First Amendment. See *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942). In 1976, the Court extended First Amendment protection to speech that does no more than propose a commercial transaction. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). Our decisions, however, have recognized the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression. *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 477 (1989); *Central Hudson*, *supra*, at 563; *Ohralik*, *supra*, at 456.

In *Central Hudson*, we set out the general scheme for assessing government restrictions on commercial speech. 447 U. S., at 566. Like the courts below, we assume that Edge, if allowed to, would air nonmisleading advertisements about the Virginia lottery, a legal activity. As to the second *Central Hudson* factor, we are quite sure that the Government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries. As in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), the activity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether. As will later be discussed, we also agree that the statutes are no broader than necessary to advance the Government's interest and hence the fourth part of the *Central Hudson* test is satisfied.

The Court of Appeals, however, affirmed the District Court's holding that the statutes were invalid because, as applied to Edge, they failed to advance directly the governmental interest supporting them. According to the Court of Appeals, whose judgment we are reviewing, this was because the 127,000 people who reside in Edge's nine-county listening area in North Carolina receive most of their radio, newspaper, and television communications from Virginia-based media. These North Carolina residents who might listen to Edge "are inundated with Virginia's lottery advertisements" and hence, the court stated, prohibiting Edge from advertising Virginia's lottery "is ineffective in shielding North Carolina residents from lottery information." This "ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech." App. to Pet. for Cert. 6a, 7a. In our judgment, the courts below erred in that respect.

A

The third *Central Hudson* factor asks whether the "regulation directly advances the governmental interest asserted." 447 U. S., at 566. It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Even if there were no advancement as applied in that manner—in this case, as applied to Edge—there would remain the matter of the regulation's general application to others—in this case, to all other radio and television stations in North Carolina and countrywide. The courts below thus asked the wrong question in ruling on the third *Central Hudson* factor. This is not to say that the validity of the statutes' application to Edge is an irrelevant inquiry, but that issue properly should be dealt with under the fourth factor of the *Central Hudson* test. As we have said, "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between

the legislature's ends and the means chosen to accomplish those ends." *Posadas, supra,* at 341.

We have no doubt that the statutes directly advanced the governmental interest at stake in this case. In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. Neither did it permit stations such as Edge, located in a nonlottery State, to carry lottery ads if their signals reached into a State that sponsors lotteries; similarly, it did not forbid stations in a lottery State such as Virginia from carrying lottery ads if their signals reached into an adjoining State such as North Carolina where lotteries were illegal. Instead of favoring either the lottery or the nonlottery State, Congress opted to support the antigambling policy of a State like North Carolina by forbidding stations in such a State to air lottery advertising. At the same time it sought not to unduly interfere with the policy of a lottery-sponsoring State such as Virginia. Virginia could advertise its lottery through radio and television stations licensed to Virginia locations, even if their signals reached deep into North Carolina. Congress surely knew that stations in one State could often be heard in another but expressly prevented each and every North Carolina station, including Edge, from carrying lottery ads. Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling. This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson,* the interest which the courts below did not fully appreciate. It is also the interest that is directly served by applying the statutory restriction to all

stations in North Carolina; and this would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest.

B

Left unresolved, of course, is the validity of applying the statutory restriction to Edge, an issue that we now address under the fourth *Central Hudson* factor, *i. e.*, whether the regulation is more extensive than is necessary to serve the governmental interest. We revisited that aspect of *Central Hudson* in *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469 (1989), and concluded that the validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions. *Id.*, at 477–478. We made clear in *Fox* that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable. *Id.*, at 480. This was also the approach in *Posadas*, 478 U. S., at 344.

We have no doubt that the fit in this case was a reasonable one. Although Edge was licensed to serve the Elizabeth City area, it chose to broadcast from a more northerly position, which allowed its signal to reach into the Hampton Roads, Virginia, metropolitan area. Allowing it to carry lottery ads reaching over 90% of its listeners, all in Virginia, would surely enhance its revenues. But just as surely, because Edge's signals with lottery ads would be heard in the nine counties in North Carolina that its broadcasts reached, this would be in derogation of the substantial federal interest in supporting North Carolina's laws making lotteries illegal. In this posture, to prevent Virginia's lottery policy from dictating what stations in a neighboring State may air, it is reasonable to require Edge to comply with the restriction against carrying lottery advertising. In other words, applying the restriction to a broadcaster such as Edge directly

advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia. We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.

In *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), we dealt with a time, place, or manner restriction that required the city to control the sound level of musical concerts in a city park, concerts that were fully protected by the First Amendment. We held there that the requirement of narrow tailoring was met if "the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," provided that it did not burden substantially more speech than necessary to further the government's legitimate interests. *Id.*, at 799 (internal quotation marks omitted). In the course of upholding the restriction, we went on to say that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Id.*, at 801.

The *Ward* holding is applicable here, for we have observed that the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context and that it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech. *Fox*, *supra*, at 477, 478. *Ward* thus teaches us that we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not

by the extent to which it furthers the Government's interest in an individual case.

This is consistent with the approach we have taken in the commercial speech context. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 462, for example, an attorney attacked the validity of a rule against solicitation "not facially, but as applied to his acts of solicitation." We rejected the appellant's view that his "as applied" challenge required the State to show that his particular conduct in fact trenched on the interests that the regulation sought to protect. We stated that in the general circumstances of the appellant's acts, the State had "a strong interest in adopting and enforcing rules of conduct designed to protect the public." *Id.*, at 464. This having been established, the State was entitled to protect its interest by applying a prophylactic rule to those circumstances generally; we declined to require the State to go further and to prove that the state interests supporting the rule actually were advanced by applying the rule in Ohralik's particular case.

Edenfield v. *Fane*, 507 U. S. 761 (1993), is not to the contrary. While treating Fane's claim as an as applied challenge to a broad category of commercial solicitation, we did not suggest that Fane could challenge the regulation on commercial speech as applied only to himself or his own acts of solicitation.

C

We also believe that the courts below were wrong in holding that as applied to Edge itself, the restriction at issue was ineffective and gave only remote support to the Government's interest.

As we understand it, both the Court of Appeals and the District Court recognized that Edge's potential North Carolina audience was the 127,000 residents of nine North Carolina counties, that enough of them regularly or from time to time listen to Edge to account for 11% of all radio listening in those counties, and that while listening to Edge they heard

no lottery advertisements. It could hardly be denied, and neither court below purported to deny, that these facts, standing alone, would clearly show that applying the statutory restriction to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy by excluding invitations to gamble from 11% of the radio listening time in the nine-county area. Without more, this result could hardly be called either "ineffective," "remote," or "conditional," see *Central Hudson*, 447 U. S., at 564, 569. Nor could it be called only "limited incremental support," *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 73 (1983), for the Government interest, or thought to furnish only speculative or marginal support. App. to Pet. for Cert. 24a, 25a. Otherwise, any North Carolina radio station with 127,000 or fewer potential listeners would be permitted to carry lottery ads because of its marginal significance in serving the State's interest.

Of course, both courts below pointed out, and rested their judgment on the fact, that the 127,000 people in North Carolina who might listen to Edge also listened to Virginia radio stations and television stations that regularly carried lottery ads. Virginia newspapers carrying such material also were available to them. This exposure, the courts below thought, was sufficiently pervasive to prevent the restriction on Edge from furnishing any more than ineffective or remote support for the statutory purpose. We disagree with this conclusion because in light of the facts relied on, it represents too limited a view of what amounts to direct advancement of the governmental interest that is present in this case.

Even if all of the residents of Edge's North Carolina service area listen to lottery ads from Virginia stations, it would still be true that 11% of radio listening time in that area would remain free of such material. If Edge is allowed to advertise the Virginia lottery, the percentage of listening time carrying such material would increase from 38% to 49%.

We do not think that *Central Hudson* compels us to consider this consequence to be without significance.

The Court of Appeals indicated that Edge's potential audience of 127,000 persons were "inundated" by the Virginia media carrying lottery advertisements. But the District Court found that only 38% of all radio listening in the nine-county area was directed at stations that broadcast lottery advertising.[4] With respect to television, the District Court observed that American adults spend 60% of their media consumption time listening to, or watching, television. The evidence before it also indicated that in four of the nine counties served by Edge, 75% of all television viewing was directed at Virginia stations; in three others, the figure was between 50 and 75%; and in the remaining two counties, between 25 and 50%. Even if it is assumed that all of these stations carry lottery advertising, it is very likely that a great many people in the nine-county area are exposed to very little or no lottery advertising carried on television. Virginia newspapers are also circulated in Edge's area, 10,400 daily and 12,500 on Sundays, hardly enough to constitute a pervasive exposure to lottery advertising, even on the unlikely assumption that the readers of those newspapers always look for and read the lottery ads. Thus the District Court observed only that "a *significant* number of residents of [the nine-county] area listens to" Virginia radio and television stations and read Virginia newspapers. App. to Pet. for Cert. 25a (emphasis added).

Moreover, to the extent that the courts below assumed that §§ 1304 and 1307 would have to effectively shield North Carolina residents from information about lotteries to advance their purpose, they were mistaken. As the Government asserts, the statutes were not "adopt[ed] . . . to keep

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[4] It would appear, then, that 51% of the radio listening time in the relevant nine counties is attributable to other North Carolina stations or other stations not carrying lottery advertising.

North Carolina residents ignorant of the Virginia Lottery for ignorance's sake," but to accommodate nonlottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States. Reply Brief for Petitioners 11. Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. *Fox*, 492 U. S., at 480. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. See *Posadas*, 478 U. S., at 344. See also *Central Hudson*, *supra*, at 569. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes. See 15 U. S. C. § 1335. See also *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 366, 433 N. E. 138, 142 (alcohol advertising), app. dism'd for want of a substantial federal question, 459 U. S. 807 (1982). Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Thus, even if it were proper to conduct a *Central Hudson* analysis of the statutes only as applied to Edge, we would not agree with the courts below that the restriction at issue

here, which prevents Edge from broadcasting lottery advertising to its sizable radio audience in North Carolina, is rendered ineffective by the fact that Virginia radio and television programs can be heard in North Carolina. In our view, the restriction, even as applied only to Edge, directly advances the governmental interest within the meaning of *Central Hudson*.

D

Nor need we be blind to the practical effect of adopting respondent's view of the level of particularity of analysis appropriate to decide its case. Assuming for the sake of argument that Edge had a valid claim that the statutes violated *Central Hudson* only as applied to it, the piecemeal approach it advocates would act to vitiate the Government's ability generally to accommodate States with differing policies. Edge has chosen to transmit from a location near the border between two jurisdictions with different rules, and rests its case on the spillover from the jurisdiction across the border. Were we to adopt Edge's approach, we would treat a station that is close to the line as if it were on the other side of it, effectively extending the legal regime of Virginia inside North Carolina. One result of holding for Edge on this basis might well be that additional North Carolina communities, farther from the Virginia border, would receive broadcast lottery advertising from Edge. Broadcasters licensed to these communities, as well as other broadcasters serving Elizabeth City, would then be able to complain that lottery advertising from Edge and other similar broadcasters renders the federal statute ineffective as applied to them. Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting North Carolina's ban on lotteries would be seriously eroded. We are unwilling to start down that road.

IV

Because the statutes challenged here regulate commercial speech in a manner that does not violate the First Amendment, the judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins, concurring in part.

I agree with the Court that the restriction at issue here is constitutional under our decision in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), even if that restriction is judged "as applied to Edge itself." *Ante*, at 431. I accordingly believe it unnecessary to decide whether the restriction might appropriately be reviewed at a more lenient level of generality, and I take no position on that question.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Three months ago this Court reaffirmed that the proponents of a restriction on commercial speech bear the burden of demonstrating a "reasonable fit" between the legislature's goals and the means chosen to effectuate those goals. See *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 416 (1993). While the "'fit'" between means and ends need not be perfect, an infringement on constitutionally protected speech must be "'in proportion to the interest served.'" *Id.*, at 417, n. 12 (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989)). In my opinion, the Federal Government's selective ban on lottery advertising unquestionably flunks that test; for the means chosen by the Government, a ban on speech imposed for the purpose of manipulating public behavior, is in no way proportionate to the Federal Government's asserted interest in protecting the antilottery policies of nonlottery States. Accordingly, I respectfully dissent.

As the Court acknowledges, the United States does not assert a general interest in restricting state-run lotteries. Indeed, it could not, as it has affirmatively removed restrictions on use of the airwaves and mails for the promotion of such lotteries. See *ante*, at 421–423. Rather, the federal interest in this case is entirely derivative. By tying the right to broadcast advertising regarding a state-run lottery to whether the State in which the broadcaster is located itself sponsors a lottery, Congress sought to support nonlottery States in their efforts to "discourag[e] public participation in lotteries." *Ante*, at 422–423, 434.[1]

Even assuming that nonlottery States desire such assistance from the Federal Government—an assumption that must be made without any supporting evidence—I would hold that suppressing truthful advertising regarding a neighboring State's lottery, an activity which is, of course, perfectly legal, is a patently unconstitutional means of effectuating the Government's asserted interest in protecting the policies of nonlottery States. Indeed, I had thought that we had so held almost two decades ago.

In *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), this Court recognized that a State had a legitimate interest in protecting the welfare of its citizens as they ventured outside the State's borders. *Id.*, at 824. We flatly rejected the notion, however, that a State could effectuate that interest by suppressing truthful, nonmisleading information regarding a legal activity in another State. We held that a State "may

[1] At one point in its opinion, the Court identifies the relevant federal interest as "supporting North Carolina's laws making lotteries illegal." *Ante*, at 429. Of course, North Carolina law does not, and, presumably, could not, bar its citizens from traveling across the state line and participating in the Virginia lottery. North Carolina law does not make the Virginia lottery illegal. I take the Court to mean that North Carolina's decision not to institute a state-run lottery reflects its policy judgment that participation in such lotteries, even those conducted by another State, is detrimental to the public welfare, and that 18 U. S. C. § 1307 (1988 ed. and Supp. III) represents a federal effort to respect that policy judgment.

not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.*, at 824–825. To be sure, the advertising in *Bigelow* related to abortion, a constitutionally protected right, and the Court in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), relied on that fact in dismissing the force of our holding in that case, see *id.*, at 345. But even a casual reading of *Bigelow* demonstrates that the case cannot fairly be read so narrowly. The fact that the information in the advertisement related to abortion was only one factor informing the Court's determination that there were substantial First Amendment interests at stake in the State's attempt to suppress truthful advertising about a legal activity in another State:

> "Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the [organization advertising abortion-related services] in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also the activity advertised pertained to constitutional interests." *Bigelow*, 421 U. S., at 822.[2]

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[2] The analogy to *Bigelow* and this case is even closer than one might think. The North Carolina General Assembly is currently considering whether to institute a state-operated lottery. See 1993 N. C. S. Bill No. 11, 140th Gen. Assembly. As with the advertising at issue in *Bigelow*, then, advertising relating to the Virginia lottery may be of interest to those in North Carolina who are currently debating whether that State should join the ranks of the growing number of States that sponsor a lottery. See *infra*, at 441.

Bigelow is not about a woman's constitutionally protected right to terminate a pregnancy.[3] It is about paternalism, and informational protectionism. It is about one State's interference with its citizens' fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969).[4] I would reaffirm this basic First Amendment principle. In seeking to assist nonlottery States in their efforts to shield their citizens from the perceived dangers emanating from a neighboring State's lottery, the Federal Government has not regulated the content of such advertisements to ensure that they are not misleading, nor has it provided for the distribution of more speech, such as warnings or educational information about gambling. Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.

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[3] If anything, the fact that underlying conduct is not constitutionally protected increases, not decreases, the value of unfettered exchange of information across state lines. When a State has proscribed a certain product or service, its citizens are all the more dependent on truthful information regarding the policies and practices of other States. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 332 (1993) (STEVENS, J., dissenting). The alternative is to view individuals as more in the nature of captives of their respective States than as free citizens of a larger polity.

[4] "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Passenger Cases*, 7 How. 283, 492 (1849).

No such interest is asserted in this case. With barely a whisper of analysis, the Court concludes that a State's interest in discouraging lottery participation by its citizens is surely "substantial"—a necessary prerequisite to sustain a restriction on commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980)—because gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether," *ante*, at 426.

I disagree. While a State may indeed have *an interest* in discouraging its citizens from participating in state-run lotteries,[5] it does not necessarily follow that its interest is "substantial" enough to justify an infringement on constitutionally protected speech,[6] especially one as draconian as the regulation at issue in this case. In my view, the sea change in public attitudes toward state-run lotteries that this country has witnessed in recent years undermines any claim that a State's interest in discouraging its citizens from participating in state-run lotteries is so substantial as to outweigh respondent's First Amendment right to distribute, and the public's right to receive, truthful, nonmisleading information about a perfectly legal activity conducted in a neighboring State.

While the Court begins its opinion with a discussion of the federal and state efforts in the 19th century to restrict lotteries, it largely ignores the fact that today hostility to state-run lotteries is the exception rather than the norm.

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[5] A State might reasonably conclude, for example, that lotteries play on the hopes of those least able to afford to purchase lottery tickets, and that its citizens would be better served by spending their money on more promising investments. The fact that I happen to share these concerns regarding state-sponsored lotteries is, of course, irrelevant to the proper analysis of the legal issue.

[6] See, *e. g.*, *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417, n. 13 (1993) (noting that restrictions on commercial speech are subject to more searching scrutiny than mere "rational basis" review).

Thirty-four States and the District of Columbia now sponsor a lottery.[7] Three more States will initiate lotteries this year.[8] Of the remaining 13 States, at least 5 States have recently considered or are currently considering establishing a lottery.[9] In fact, even the State of North Carolina, whose antilottery policies the Federal Government's advertising ban are purportedly buttressing in this case, is considering establishing a lottery. See 1993 N. C. S. Bill No. 11, 140th Gen. Assembly. According to one estimate, by the end of this decade all but two States (Utah and Nevada) will have state-run lotteries.[10]

The fact that the vast majority of the States currently sponsor a lottery, and that soon virtually all of them will do so, does not, of course, preclude an outlier State from following a different course and attempting to discourage its citizens from partaking of such activities. But just as the fact that "the vast majority of the 50 States . . . prohibit[ed] casino gambling" purported to inform the Court's conclusion in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S., at 341, that Puerto Rico had a "substantial" interest in discouraging such gambling, the national trend in the opposite direction in this case surely undermines the United States' contention that nonlottery States have a "substantial" interest in discouraging their citizens from traveling across state lines and participating in a neighboring State's lottery. The Federal Government and the States simply do not have an overriding or "substantial" interest in

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[7] Selinger, Special Report: Marketing State Lotteries, City and State 14 (May 24, 1993).

[8] *Ibid.*

[9] See, *e. g.*, 1993 Ala. H. Bill No. 75, 165th Legislature—Regular Sess.; 1993 Miss. S. Concurrent Res. No. 566, 162d Legislature—Regular Sess.; 1993 N. M. S. Bill No. 141, 41st Legislature—First Regular Sess.; 1993 N. C. S. Bill No. 11, 140th Gen. Assembly; 1993 Okla. H. Bill No. 1348, 44th Legislature—First Regular Sess.

[10] Selinger, *supra*.

seeking to discourage what virtually the entire country is embracing, and certainly not an interest that can justify a restriction on constitutionally protected speech as sweeping as the one the Court today sustains.

I respectfully dissent.

Syllabus

TXO PRODUCTION CORP. *v.* ALLIANCE RESOURCES CORP. ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 92–479. Argued March 31, 1993—Decided June 25, 1993

In a common-law slander of title action in West Virginia state court, respondents obtained a judgment against petitioner TXO Production Corp. for $19,000 in actual damages and $10 million in punitive damages. Accepting respondents' version of disputed issues of fact, the record shows, *inter alia*, that TXO knew that respondent Alliance Resources Corp. had good title to the oil and gas development rights at issue; that TXO acted in bad faith by advancing a claim on those rights on the basis of a worthless quitclaim deed in an effort to renegotiate its royalty arrangement with Alliance; that the anticipated gross revenues from oil and gas development—and therefore the amount of royalties that TXO sought to renegotiate—were substantial; that TXO was a large, wealthy company; and that TXO had engaged in similar nefarious activities in other parts of the country. In affirming, the State Supreme Court of Appeals, among other things, rejected TXO's contention that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment as interpreted in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1.

Held: The judgment is affirmed.

187 W. Va. 457, 419 S. E. 2d 870, affirmed.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN, concluded in Parts II and III that the punitive damages award did not violate the substantive component of the Due Process Clause. Pp. 453–462.

(a) With respect to the question whether a particular punitive award is so "grossly excessive" as to violate the Due Process Clause, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111, this Court need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. It can be said, however, that a general concern of reasonableness properly enters into the constitutional calculus. See *Haslip*, 499 U. S., at 18. Although the parties' desire to formulate a "test" is understandable, neither respondents' proposed rational-basis standard nor TXO's proposed heightened-scrutiny standard is satisfactory. Pp. 453–458.

(b) The punitive award in this case was not so "grossly excessive" as to violate due process. The dramatic disparity between the actual damages and the punitive award is not controlling in a case of this character. On the record, the jury may reasonably have determined that TXO set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive award is certainly large, but in light of the millions of dollars potentially at stake, TXO's bad faith, the fact that TXO's scheme was part of a larger pattern of fraud, trickery, and deceit, and TXO's wealth, the award cannot be said to be beyond the power of the State to allow. Pp. 459–462.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE KENNEDY, concluded in Part IV that TXO's procedural due process arguments—that the jury was not adequately instructed, that the punitive damages award was not adequately reviewed by the trial or the appellate court, and that TXO had no advance notice that the jury might be allowed to return such a large award or to rely on potential harm as a basis for the award—must be rejected. The first argument need not be addressed as it was not presented or passed on below, and the remaining arguments are meritless. Pp. 462–466.

JUSTICE KENNEDY concluded that the plurality's "reasonableness" formulation is unsatisfactory, since it does not provide a standard by which to compare the punishment to the malefaction that gave rise to it. A more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. When a punitive damages award reflects bias, passion, or prejudice by the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award. The record in this case, when viewed as a whole, demonstrates that it was rational for the jury to place great weight on the evidence of TXO's deliberate and wrongful conduct, and makes it probable that the verdict was motivated by a legitimate concern for punishment and deterrence. Pp. 466–469.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that, although "procedural due process" requires judicial review of punitive damages awards for reasonableness, there is no federal constitutional right to a substantively correct "reasonableness" determination. If the Due Process Clause of the Fourteenth Amendment were the secret repository for such an unenumerated right, it would surely also contain the substantive right not to be subjected to excessive fines, which would render the Eighth Amendment's Excessive Fines Clause superfluous. The Constitution gives federal courts no business in this area, except to assure that due process (*i. e.*, traditional procedure) has been observed.

Syllabus

Since the jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the State Supreme Court of Appeals, petitioner's due process claims must fail. Pp. 470–472.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and BLACKMUN, J., joined, and in which KENNEDY, J., joined as to Parts I and IV. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 466. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 470. O'CONNOR, J., filed a dissenting opinion, in which WHITE, J., joined, and in which SOUTER, J., joined as to Parts II–B–2, II–C, III, and IV, *post*, p. 472.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Rex E. Lee* and *Richard L. Horstman.*

Laurence H. Tribe argued the cause for respondents. With him on the brief were *Kenneth J. Chesebro, Wade T. Watson, Michael H. Gottesman,* and *G. David Brumfield.**

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*Briefs of *amici curiae* urging reversal were filed for the American Automobile Manufacturers Association et al. by *Victor E. Schwartz;* for the American Council of Life Insurance et al. by *Erwin N. Griswold, Richard E. Barnsback, Phillip E. Stano, Theresa L. Sorota,* and *Patrick J. McNally;* for the American Tort Reform Association et al. by *Andrew L. Frey, Charles Rothfeld,* and *Fred J. Hiestand;* for Arthur Andersen & Co. et al. by *Leonard P. Novello, Jon N. Ekdahl, Harris J. Amhowitz, Howard J. Krongard, Carl D. Liggio,* and *Eldon Olson;* for the Business Council of Alabama by *Forrest S. Latta;* for the Center for Claims Resolution by *John D. Aldock* and *Frederick C. Schafrick;* for Continental Casualty Co. by *Rodney L. Eshelman, Donald T. Ramsey,* and *David M. Rice;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for Owens-Illinois, Inc., et al. by *Walter Dellinger;* for the Product Liability Advisory Council, Inc., by *Malcolm E. Wheeler;* for the Securities Industries Association, Inc., by *Paul Windels III* and *William J. Fitzpatrick;* and for the Washington Legal Foundation by *Carolyn B. Kuhl, Daniel J. Popeo,* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the Alabama Trial Lawyers Association by *Bruce J. McKee;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Roxanne Barton Conlin;* for the Center for Auto Safety by *Clarence M. Ditlow III* and *Albert M. Pearson III;* for the Consumers Union of United States et al. by *An-*

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE BLACKMUN join, and in which JUSTICE KENNEDY joins as to Parts I and IV.

In a common-law action for slander of title, respondents obtained a judgment against petitioner for $19,000 in actual damages and $10 million in punitive damages. The question we granted certiorari to decide is whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment, either because its amount is excessive or because it is the product of an unfair procedure.

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drew F. Popper; for the National Association of Securities and Commercial Law Attorneys by *Paul F. Bennett, David B. Gold, Kevin P. Roddy,* and *William S. Lerach;* for Public Citizen by *Leslie A. Brueckner* and *David C. Vladeck;* for Trial Lawyers for Public Justice by *Brent Rosenthal* and *Arthur H. Bryant;* for University Scholars and Law Professors by *Michael Rustad;* and for the West Virginia Trial Lawyers Association by *Mark M. Hager.*

Briefs of *amici curiae* were filed for the Attorney General of Alabama et al. by the Attorneys General, *pro se,* for their respective States as follows: *Darrell V. McGraw, Jr.,* of West Virginia, *Winston Bryant* of Arkansas, *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Robert A. Marks* of Hawaii, *Larry EchoHawk* of Idaho, *Bonnie J. Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Tom Udall* of New Mexico, *Robert Abrams* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Lee Fisher* of Ohio, *Susan Brimer Loving* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.,* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Dan Morales* of Texas, and *Christine O. Gregoire* of Washington; for CBS, Inc., et al. by *P. Cameron DeVore, Marshall J. Nelson,* and *Douglas P. Jacobs;* for the Church of Scientology of California by *Eric M. Lieberman, Terry Gross,* and *Michael Lee Hertzberg;* and for Phillips Petroleum Co. et al. by *Theodore B. Olson, Larry L. Simms,* and *Theodore J. Boutrous, Jr.*

I

On August 23, 1985, TXO Production Corp. (TXO) commenced this litigation by filing a complaint in the Circuit Court of McDowell County, West Virginia, for a declaratory judgment removing a cloud on title to an interest in oil and gas development rights. Respondents, including Alliance Resources Corp. (Alliance), filed a counterclaim for slander of title that went to trial before a jury in June 1990. The jury verdict in respondents' favor, which has been affirmed by the Supreme Court of Appeals of West Virginia, makes it appropriate to accept respondents' version of disputed issues of fact.

In 1984, geologists employed by TXO concluded that the recovery of oil and gas under the surface of a 1,002.74-acre tract of land known as the "Blevins Tract" would be extremely profitable. They strongly recommended that TXO—a large company that was engaged in oil and gas production in 25 States—obtain the rights to develop the oil and gas resources on the Blevins Tract.

Those rights were then controlled by Alliance.[1] Prodded by its geologists, TXO approached Alliance with what Alliance considered to be a "'phenomenal offer.'" 187 W. Va. 457, 462, 419 S. E. 2d 870, 875 (1992). TXO would pay Alliance $20 per acre in cash, pay 22 percent of the oil and gas revenues in royalties, and pay all of the development costs. On April 2, 1985, Alliance accepted TXO's offer, agreeing to assign its interest in the Tract to TXO. With respect to title to the property, Alliance agreed to return the consider-

[1] Alliance was the assignee of a leasehold interest that respondents George King and Grover C. Goode, doing business as Georgia Fuels, had obtained from respondent Tug Fork Land Company. Georgia Fuels reserved an overriding royalty interest in the lease.

ation paid to it if TXO's attorney determined that "title had failed."[2]

Shortly after the agreement was signed, TXO's attorneys discovered a 1958 deed conveying certain mineral rights in the Tract from respondent Tug Fork Land Company, a predecessor in interest of Alliance, to a coal operator named Leo J. Signaigo, Jr., who had later conveyed those rights to the Hawley Coal Mines Company, which had, in turn, reconveyed them to the Virginia Crews Coal Company (Virginia Crews). Interviews with Signaigo, and with representatives of Hawley and Virginia Crews, established that the parties all understood that only the right to mine coal had been involved in those transactions; none of them claimed any interest in oil or gas development rights. Moreover, the text of the 1958 deed made it "perfectly clear" that the grantor had reserved "all the oil and gas underlying" the Blevins Tract.[3]

TXO first advised Alliance of the "distinct possibility or probability" that its "leasehold title fails" in July 1985.[4] In the meantime, despite its knowledge that any claim that the 1958 deed created a cloud on title to the oil and gas develop-

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[2] The agreement provided, in pertinent part:

"Assignor [Alliance] hereby warrants title to the extent that in the event of conducting title examination of the assigned acreage, Assignee's examining attorney determines that title has failed to all or any part of the assigned acreage, Assignor will reimburse to Assignee the consideration paid to it for any such lands to which title is determined to have failed." See 187 W. Va., at 463, n. 1, 419 S. E. 2d, at 876, n. 1.

[3] The West Virginia Supreme Court of Appeals "unequivocally [found] that the deed was unambiguous," *id.*, at 464, 419 S. E. 2d, at 877, stating that "[a]lthough the deed does not demonstrate the most artful drafting, it does *clearly reserve all of the oil and gas under the Blevins Tract to Tug Fork Land Company*," *id.*, at 463–464, 419 S. E. 2d, at 876–877 (emphasis in original). The entire deed is reprinted as Appendix A to the opinion of the State Supreme Court of Appeals. See *id.*, at 467–471, 419 S. E. 2d, at 890–894.

[4] See Plaintiff's Exhibit No. 4, reprinted in App. to Reply Brief for Petitioner 1a.

ment rights would have been "frivolous,"[5] TXO made two attempts to lend substance to such a claim. First, after unsuccessfully trying to convince Virginia Crews that it had an interest in the oil and gas, TXO paid the company $6,000 for a quitclaim deed conveying whatever interest it might have to TXO. TXO recorded the deed without advising Alliance.[6] Second, TXO unsuccessfully attempted to induce Mr. Signaigo to execute a false affidavit indicating that the 1958 deed might have included oil and gas rights.

On July 12, after having recorded the quitclaim deed, TXO wrote to Alliance asserting that there was a title objection and implying that TXO might well have acquired the oil and gas rights from Virginia Crews. It then arranged a meeting in August and attempted to renegotiate the royalty arrangement. When the negotiations were unsuccessful, TXO commenced this litigation. According to the West Virginia Supreme Court of Appeals, TXO "knowingly and intentionally brought a frivolous declaratory judgment action" when its "real intent" was "to reduce the royalty payments under a 1,002.74 acre oil and gas lease," and thereby "increas[e] its interest in the oil and gas rights."[7]

TXO's declaratory judgment action was decided on the basis of the parties' written submissions. The court granted

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[5] In the words of the West Virginia Supreme Court of Appeals: "In this case, TXO Production Corporation, a subsidiary of USX, knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title." 187 W. Va., at 462, 419 S. E. 2d, at 875.

[6] According to an internal TXO memorandum, TXO viewed the quitclaim deed as offering "a chance of the court conferring TXO with 100% interest in the O[il] & G[as] estate as opposed to having a 78% net lease if the court rules in favor of Tug Fork's title." Plaintiff's Exhibit No. 8 (TXO Production Corp. Inter-Office Memorandum (May 30, 1985)). The West Virginia Supreme Court of Appeals referred to TXO's acquisition and recording of the quitclaim deed as nothing less than "an attempt to steal [Alliance's] land." 187 W. Va., at 468, 419 S. E. 2d, at 881.

[7] *Id.*, at 462, 464, 419 S. E. 2d, at 875, 877.

respondents' motion to prohibit TXO from introducing expert and extrinsic evidence concerning the meaning of the 1958 deed to Signaigo because the deed itself was unambiguous. On the basis of the written record, the court found that TXO had asserted a claim to title to the oil and gas under the Blevins Tract by virtue of the quitclaim deed from Virginia Crews, App. 15, but that the deed was a "nullity."[8]

The counterclaim for slander of title was subsequently tried to a jury. In addition to the evidence that TXO knew that Alliance had good title to the oil and gas and that TXO had acted in bad faith when it advanced a claim on the basis of the worthless quitclaim deed in an effort to renegotiate its royalty arrangement, Alliance introduced evidence showing that TXO was a large company in its own right and a wholly owned subsidiary of an even larger company;[9] that the anticipated gross revenues from oil and gas development—and therefore the amount of royalties that TXO sought to renegotiate—were substantial;[10] and that TXO had

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[8] "The Court further finds, as a matter of law, that TXO Production Corp. obtained no interest or title to the oil and gas underlying the 1,002.74 acres in question from Virginia Crews Coal Company by reason of the quit claim deed in question. The quit claim deed of Virginia Crews Coal Company conveyed no title to TXO Production Corp. because Virginia Crews Coal Company obtained no title to the oil and gas from Hawley Coal Mining Corporation and said quit claim deed is, therefore, a nullity." App. 18.

[9] Because TXO had refused to disclose any financial records in response to Alliance's discovery requests, Alliance employed an expert witness who analyzed public financial statements of TXO's parent, USX Corporation; he estimated that the TXO division of USX had a net worth of between "$2.2 billion and $2.5 billion." 187 W. Va., at 477, 419 S. E. 2d, at 890. Although TXO objected to the evidence as including assets of affiliates, it did not offer any rebuttal testimony on that issue. *Ibid.*

[10] Respondents introduced expert testimony demonstrating that the Blevins Tract could support between 15 and 25 wells. Tr. 98–99. A TXO executive confirmed that TXO intended, when it acquired the rights to develop the Blevins Tract, to develop multiple wells. *Id.*, at 673. Respondents also introduced an internal TXO memorandum, dated April 29, 1985, which showed that benchmark wells located near the Blevins Tract had reserves of 500,000 Mcf, and that the prevailing market rate was $3.00

engaged in similar nefarious activities in its business dealings in other parts of the country. 187 W. Va., at 468–470, 419 S. E. 2d, at 881–883.

The jury's verdict of $19,000 in actual damages was based on Alliance's cost of defending the declaratory judgment action. It is fair to infer that the punitive damages award of $10 million was based on other evidence.

In support of motions for judgment notwithstanding the verdict and for remittitur, TXO argued that the punitive damages award violated the Due Process Clause. Counsel contended that under the "general punitive damage instruction given in this case, the jury was left to their own devices without any yardstick as to what was a reasonable punitive damage award. And for that reason, a vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds."[11] In response, counsel for Alliance argued that the constitutional objection had been waived, that the misconduct was particularly egregious,[12] and that the award was not excessive.

Mcf. Trial testimony demonstrated that TXO was optimistic that the Blevins Tract would be quite profitable. See Tr. 672–673 (testimony of TXO official that the Blevins Tract was a good prospect, that it presented a "reasonably good opportunity," and that it offered the potential for the development of numerous wells).

Putting these figures together, respondents contend that TXO anticipated revenues of as high as $1.5 million for each well developed on the Tract. Brief for Respondents 3. Further extrapolating, respondents contend that "the value of the total income stream that TXO would expect from the Blevins Tract was somewhere between $22.5 million (with 15 wells) and $37.5 million (with 25 wells)." *Id.*, at 4.

[11] App. to Pet. for Cert. 64a.

[12] In response to TXO's attempt to distinguish cases involving roughly comparable awards on the ground that they involved "egregious" conduct, the trial judge had interjected: "What could be more egregious than the vice president of a company saying, well, testifying and saying that he knew all along that this property belonged to Tug Fork?" *Id.*, at 66a.

The trial court denied the motions without opinion and TXO appealed.[13]

On appeal, TXO assigned three primary errors: (1) that no cause of action for slander of title existed in West Virginia or had been established by the evidence; (2) that the West Virginia Rules of Evidence were violated by the admission of testimony of lawyers involved in litigation against TXO in other States to show TXO's wrongful intent; and (3) that the award of punitive damages violated the Due Process Clause as interpreted in our opinion in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991), and in the West Virginia Supreme Court of Appeals' recent decision in *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991). The State Supreme Court of Appeals affirmed.

The court first disposed of the state-law issues.[14] It introduced its discussion of the federal issue by describing the kinds of defendants against whom punitive damages had been awarded after our decision in *Haslip*.[15] Turning to the

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[13] *Id.*, at 71a–72a.

[14] "Slander of title," the court noted, "long has been recognized as a common law cause of action." 187 W. Va., at 465, 419 S. E. 2d, at 878. The court found that respondents had demonstrated all the elements of the tort: that TXO, by recording the frivolous quitclaim deed, had published a false statement derogatory to respondents' title, had done so with "malice," and had caused special damages, here the attorney's fees, as a result of its attack on respondents' interest in the oil and gas development rights. See *id.*, at 466–468, 419 S. E. 2d, at 879–881.

[15] "We have examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable. Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." *Id.*, at 474–475, 419 S. E. 2d, at 887–888. In a concurring opinion two justices criticized that categorization and stated that West Virginia's traditional rule summarizing the type of conduct that would give rise to punitive damages was better stated in the following syllabus:

"'In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affect-

facts of this case, the court stated that the application of its "reasonable relationship" test required it to consider these three factors:

> "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." 187 W. Va., at 476, 419 S. E. 2d, at 889.

It held that each of those factors supported the award in this case, stating:

> "The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit." *Ibid.* (emphasis in original).

We granted certiorari, 506 U. S. 997 (1992), and now affirm.

II

TXO first argues that a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law.

TXO correctly points out that several of our opinions have stated that the Due Process Clause of the Fourteenth

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ing the rights of others appear, or where legislative enactment authorizes, it, the jury may assess exemplary, punitive, or vindictive damages. . . .'" *Id.*, at 484, 419 S. E. 2d, at 895.

Amendment imposes substantive limits "beyond which penalties may not go." *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 78 (1907). See also *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919); *Standard Oil Co. of Ind.* v. *Missouri*, 224 U. S. 270, 286 (1912).[16] Moreover, in *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482 (1915), the Court actually set aside a penalty imposed on a telephone company on the ground that it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause. *Id.*, at 491.[17] In an earlier case the Court had stated that it would not review state action fixing the penalties for unlawful conduct unless "the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909).

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[16] In each of those cases, the Court actually found no constitutional violation. Thus, in the *Seaboard Air Line R. Co.* case, the Court concluded: "We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the State." 207 U. S., at 78–79.

[17] In doing so, however, the Court emphasized the fact that the company was punished for conduct that had been undertaken in complete good faith. It noted:

"There was no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." 238 U. S., at 490–491.

While respondents "unabashedly" denigrate those cases as "*Lochner*-era precedents,"[18] they overlook the fact that the Justices who had dissented in the *Lochner* case itself joined those opinions.[19] More importantly, respondents do not dispute the proposition that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award. Brief for Respondents 17. They contend, however, that the standard of review should be the same standard of rational-basis scrutiny that is appropriate for reviewing state economic legislation.

TXO, on the other hand, argues that punitive damages awards should be scrutinized more strictly than legislative penalties because they are typically assessed without any legislative guidance expressing the considered judgment of the elected representatives of the community.[20] TXO urges that we apply a form of heightened scrutiny, the first step of which is to apply certain "objective" criteria to determine whether a punitive award presumptively violates those notions of "fundamental fairness" inherent in the concept of due process of law. Relying heavily on the plurality opinion in *Schad* v. *Arizona*, 501 U. S. 624 (1991), petitioner argues that "'history and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require,'" Brief for Petitioner 15–16 (quoting *Schad*, 501 U. S., at 640 (plurality opinion), and that therefore we should examine, as "objective" criteria of fairness, (1) awards of punitive

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[18] See Brief for Respondents 17–18.

[19] Justices Holmes, Harlan, White, and Day dissented in *Lochner* v. *New York*, 198 U. S. 45 (1905). See *id.*, at 65, 75. In all of the cases relied on by TXO, there were only two solitary dissents. Ironically, one of the two was that of Justice Peckham, the author of the majority opinion in *Lochner*. See *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 79 (1907); 198 U. S., at 52. The comparison requires two caveats. Justice Harlan died in the fall of 1911, and therefore only participated in the *Seaboard Air Line* and *Waters-Pierce* cases. Also, Justice Day did not participate in the *Standard Oil* case.

[20] Brief for Petitioner 13–14.

damages upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards, Brief for Petitioner 16.[21] Under petitioner's proposed framework, when this inquiry demonstrates that an award "exceeds the bounds of contemporary and historical practice by *orders of magnitude*," *id.*, at 21 (emphasis in original), that award must be struck down as arbitrary and excessive unless there is a "compelling and particularized justification" for an award of such size.[22]

The parties' desire to formulate a "test" for determining whether a particular punitive award is "grossly excessive" is understandable. Nonetheless, we find neither formulation satisfactory. Under respondents' rational-basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable. On the other hand, we reject the premise underlying TXO's invocation of heightened scrutiny. The review of a jury's award for arbitrariness and the review of legislation surely are significantly different. Still, it is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process. The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based

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[21] As counsel for petitioner noted at oral argument, these objective criteria in part track the analysis of Justice Powell's opinion for the Court in *Solem* v. *Helm*, 463 U. S. 277, 290–292 (1983). See Tr. of Oral Arg. 26.

[22] Applying this "test," TXO concludes (not surprisingly) that the award in this case exceeds prior awards given both within the State of West Virginia and in other jurisdictions in allegedly comparable circumstances, and cannot be defended as rationally related to a state interest in either retribution or deterrence. The punitive award in this case, petitioner contends, is thus supported only by West Virginia's patently illegitimate interest in redistributing wealth away from a large, out-of-state corporation.

on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, see *Haslip*, 499 U. S., at 24–40 (SCALIA, J., concurring in judgment), or virtually so, *id.*, at 40–42 (KENNEDY, J., concurring in judgment).

Nor are we persuaded that reliance on petitioner's "objective" criteria is the proper course to follow. We have, of course, relied on history and "widely shared practice" as a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process, see *Schad*, 501 U. S., at 637–643 (plurality opinion), and whether a term of imprisonment under certain circumstances is cruel and unusual punishment, see *Solem* v. *Helm*, 463 U. S. 277, 290–292 (1983). We question, however, the utility of such a comparative approach *as a test* for assessing whether a particular punitive award is presumptively unconstitutional.

It is a relatively straightforward task to draw intrajurisdictional and interjurisdictional comparisons on such matters as the definition of first-degree murder *(Schad)* or the penalty imposed on nonviolent repeat offenders *(Solem)*. The same cannot be said of the task of drawing such comparisons with regard to punitive damages awards by juries. Such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make. Cf. *Haslip*, *supra*, at 41–42 (KENNEDY, J., concurring in judgment). Such analysis might be useful in considering whether a state practice

of permitting juries to rely on a particular factor, such as the defendant's out-of-state status, would violate due process.[23] As an analytical approach to assessing a particular award, however, we are skeptical. Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.

In the end, then, in determining whether a particular award is so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment, *Waters-Pierce Oil Co.*, 212 U. S., at 111, we return to what we said two Terms ago in *Haslip:* "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." 499 U. S., at 18. And, to echo *Haslip* once again, it is with this concern for reasonableness in mind that we turn to petitioner's argument that the punitive award in this case was so "grossly excessive" as to violate the substantive component of the Due Process Clause.[24]

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[23] Of course, such a state policy would likely be subject to challenge on other grounds as well.

[24] JUSTICE SCALIA's assertion notwithstanding, see *post,* at 471, we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. As JUSTICE O'CONNOR points out, state law generally imposes a requirement that punitive damages be "reasonable." See *post,* at 475–479. A violation of a state law "reasonableness" requirement would not, however, necessarily establish that the award is so "grossly excessive" as to violate the Federal Constitution. Furthermore, the fact that our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award does not,

III

In support of its submission that this award is "grossly excessive," TXO places its primary emphasis on the fact that it is over 526 times as large as the actual damages award. TXO correctly notes that state courts have long held that "exemplary damages allowed should bear some proportion to the real damage sustained."[25] Moreover, in our recent decision in *Haslip*, *supra*, in which we upheld a punitive damages award of four times the amount of compensatory damages, we noted that that award "may be close to the line" of constitutional permissibility. *Id.*, at 23. Following that decision, the West Virginia Supreme Court of Appeals had also observed that as "a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va., at 668, 413 S. E. 2d, at 909.

That relationship, however, was only one of several factors that the state court mentioned in its *Garnes* opinion. Earlier in its opinion it gave this example:

> "For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We

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of course, make that Clause "the secret repository of all sorts of other, unenumerated, substantive rights," *post*, at 470 (SCALIA, J., concurring in judgment). Indeed, it is ironic that JUSTICE SCALIA acknowledges that the Due Process Clause of the Fourteenth Amendment incorporates substantive guarantees of the Bill of Rights while relying on the enumeration of one of those rights (the Excessive Fines Clause of the Eighth Amendment) as evidence that such a right has no counterpart in the Due Process Clause. *Post*, at 470–471.

[25] *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852); *Hunter* v. *Kansas City R. Co.*, 213 Mo. App. 233, 245, 248 S. W. 998, 1002 (1923); *Mobile & Montgomery R. Co.* v. *Ashcraft*, 48 Ala. 15, 33 (1872); *P. J. Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480 (1882).

> would allow a jury to impose substantial punitive damages in order to discourage future bad acts." *Id.*, at 661, 413 S. E. 2d, at 902 (citing C. Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1181 (1931)).

When the court identified the several factors that should be mentioned in instructions to the jury, the first one that it mentioned reflected that example. It said:

> "Punitive damages should bear a reasonable relationship to the harm *that is likely to occur from the defendant's conduct* as well as to the harm that actually has occurred. If the defendant's actions caused *or would likely cause* in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be much greater." 186 W. Va., at 668, 413 S. E. 2d, at 909 (emphasis added).

Taking account of the potential harm that might result from the defendant's conduct in calculating punitive damages was consistent with the views we expressed in *Haslip*, *supra*. In that case we endorsed the standards that the Alabama Supreme Court had previously announced, one of which was "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred," *id.*, at 21 (emphasis added).

Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. In this case the State Supreme Court of Appeals concluded that TXO's pattern of behavior "could potentially cause millions of dol-

lars in damages to other victims."[26] Moreover, respondents argue that the record evidence would support a finding that Alliance's 22 percent share of the projected revenues from the full development of the oil and gas rights amounted to between $5 million and $8.3 million, depending on how many wells were developed.[27] Even if these figures are exaggerated—as TXO persuasively argues, see Reply Brief for Petitioner 9–12—the jury could well have believed that TXO was seeking a multimillion dollar reduction in its potential royalty obligation. In fact, in making their closing arguments to the jury, counsel for respondents stressed, in addition to TXO's vast wealth, the tremendous financial gains that TXO hoped to achieve through its "elaborate scheme." Counsel for Alliance argued:

> "They wouldn't have gone to this elaborate scheme—No, they wouldn't now, because they thought this was a huge, gonna be a huge money-making lease. Gonna puts lots of wells on it. That's why it was worth the scheme. And the punishment should fit it, and fit the wealth." App. to Brief for Petitioner 23a.

Echoing the same theme, counsel for respondent Tug Fork Land Company argued:

> "You have to go on what TXO thought when they were going into this well. They thought it was going to be a better well than it was. But, see, it got caught up in this litigation and now, I submit to you, they are saying that it is not as good a well as it was. And that's a fact that is in some contention here. But regardless of how good it was, when they went in and did their operation back in May, June, July and August of 1985, they had projected that this would be a 20 year well and would produce a lot of money." Tr. 748–749.

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[26] 187 W. Va., at 476, 419 S. E. 2d, at 889.

[27] See n. 10, *supra*.

While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the "potential harm" to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities." *Haslip*, 499 U. S., at 18.

In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth,[28] we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

IV

TXO also argues that the punitive damages award is the result of a fundamentally unfair procedure because the jury

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[28] TXO also contends that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led the jury to base its award on impermissible passion and prejudice. Brief for Petitioner 22–23. Under well-settled law, however, factors such as these are typically considered in assessing punitive damages. Indeed, the Alabama factors we approved in *Haslip* included both. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 21–22 (1991) ("(b) . . . the existence and frequency of similar past conduct; . . . (d) the 'financial position' of the defendant").

was not adequately instructed, because its award was not adequately reviewed by the trial or the appellate court, and because TXO had no advance notice that the jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. We decline to address the first argument as it was not argued or passed on below. We find the remaining arguments meritless.

The instruction to the jury on punitive damages differed from that found adequate in *Haslip*, see 499 U. S., at 6, n. 1, in two significant respects. It authorized the jury to take account of "the wealth of the perpetrator" in recognition of the fact that effective deterrence of wrongful conduct "may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances."[29] It also stated that one of the purposes of punitive damages is "to provide additional compensation for

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[29] The instruction on punitive damages, to which TXO objected, read as follows:

"In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

"If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

"In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances." App. 34–35.

TXO did not propose a different instruction.

the conduct to which the injured parties have been subjected." See n. 29, *supra*.

We agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident. We also do not understand the reference in the instruction to "additional compensation." We note, however, that in *Haslip* we referred to the "financial position" of the defendant as one factor that could be taken into account in assessing punitive damages, see n. 28, *supra*. We also note that TXO did not squarely argue in the West Virginia Supreme Court of Appeals that these aspects of the jury instruction violated the Due Process Clause, see Brief for Appellant in No. 20281 (W. Va. Sup. Ct.), pp. 44–48,[30] possibly because many States permit the jury to take account of the defendant's wealth.[31] Because TXO's constitutional attack on the jury instructions was not properly presented to the highest court of the State, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 77–80 (1988), we do not pass on it.

The only basis for criticizing the trial judge's review of the punitive damages award is that he did not articulate his reasons for upholding it. He did, however, give counsel an adequate hearing on TXO's postverdict motions, and during one colloquy indicated his agreement with the jury's appraisal of

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[30] In fact, in its brief before that court, petitioner stated that "[i]t is clear under West Virginia law that the financial standing *of the defendant* is an element to be taken into consideration in determining the proper measure of punitive or exemplary damages." Brief for Appellant in No. 20281 (W. Va. Sup. Ct.), p. 37 (emphasis in original). There is no hint in that brief that petitioner thought that this state rule violated due process.

[31] See, *e. g.*, *Wagner* v. *McDaniels*, 9 Ohio St. 3d 184, 186–187, 459 N. E. 2d 561, 564 (1984); *Gamble* v. *Stevenson*, 305 S. C. 104, 111, n. 3, 406 S. E. 2d 350, 354, n. 3 (1991); *Lunsford* v. *Morris*, 746 S. W. 2d 471, 473 (Tex. 1988); *Viking Ins. Co.* v. *Jester*, 310 S. C. 317, 332, 836 S. W. 2d 371, 379 (Ark. 1992).

the egregious character of the conduct of TXO's executives. See n. 12, *supra*. While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.

Petitioner's criticism of the West Virginia Supreme Court of Appeals' opinion is based largely on the court's colorful reference to classes of "really mean" and "really stupid" defendants. That those terms played little, if any, part in its actual evaluation of the propriety of the damages award is evident from the reasoning in its thorough opinion, succinctly summarized in passages we have already quoted. Moreover, two members of the court who wrote separately to disassociate themselves from the "really mean" and "really stupid" terminology shared the views of the rest of the members of the court on the merits. See 187 W. Va., at 484, 419 S. E., at 895 (McHugh, C. J., concurring). The opinion was unanimous and gave careful attention to the relevant precedents, including our decision in *Haslip* and their own prior decision in *Garnes*.

Finally, we find no merit in TXO's argument that the procedure followed in this case "was unconstitutionally vague" because petitioner had no notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages. In *Wells* v. *Smith*, 171 W. Va. 97, 105, 297 S. E. 2d 872, 880 (1982), the West Virginia Supreme Court of Appeals held that a defendant could be liable for punitive damages even if the jury did not award the plaintiff *any* compensatory damages.[32] In any event, the notice com-

[32] In *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991), which was decided well after the underlying conduct in this case occurred, the West Virginia Supreme Court of Appeals overturned that aspect of *Wells*, holding instead that the jury must award *some* amount of compen-

ponent of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. *Haslip*, 499 U. S., at 24, n. 12. Prior law, in West Virginia and elsewhere, unquestionably did so.

The judgment of the West Virginia Supreme Court of Appeals is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I concur in the plurality's statement of the case and in Part IV of the plurality opinion, in which the plurality holds that the judicial procedures that were followed in awarding punitive damages against TXO fulfilled the constitutional requirement of due process of law. I am not in full agreement, however, with the plurality's discussion of the substantive requirements of the Due Process Clause in Parts II and III, in which it concentrates on whether the punitive damages award was "'grossly excessive.'" *Ante*, at 458, 462. I agree that the approaches proposed by the parties to this case are unsatisfactory, see *ante*, at 456–458, but I do not believe that the plurality's replacement, a general focus on the "'reasonableness'" of the award, *ante*, at 458, quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 18 (1991), is a significant improvement. To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive

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satory damages before it can award punitive damages. See 186 W. Va., at 667, 413 S. E. 2d, at 908.

damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards.

As I have suggested before, see *id.*, at 41 (opinion concurring in judgment), a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award. JUSTICE O'CONNOR is correct in observing that in implementing this principle, courts have often looked to the size of the award as one indication that it resulted from bias, passion, or prejudice, see *post*, at 476–478, but that is not the sole, or even necessarily the most important, sign. Other objective indicia of the type discussed by the plurality, see *ante*, at 455–457, as well as direct evidence from the trial record, are also helpful in ascertaining whether a jury stripped a party of its property in an arbitrary way and not in accordance with the standards of rationality and fairness the Constitution requires.

The plurality suggests that the jury in this case acted in conformance with these standards of rationality in large part on the basis of what it perceives to be the rational relation

between the size of the award and the degree of harm threatened by TXO's conduct. See *ante*, at 460–462. I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational. It is a commonplace that a jury verdict must be reviewed in relation to the record before it. See, *e. g.*, *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, see, *e. g.*, *Heller* v. *Doe*, *ante*, at 320; *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 315 (1993); *Vance* v. *Bradley*, 440 U. S. 93, 111 (1979), a jury is bound to consider only the evidence presented to it in arriving at a judgment. JUSTICE O'CONNOR demonstrates that the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct and so would not have permitted a reasonable jury to render its verdict on this basis. See *post*, at 484–489. We must therefore look for other explanations of the jury verdict to decide whether it may stand.

On its facts, this case is close and difficult; JUSTICE O'CONNOR makes a plausible argument, based on the record and the trial court's instructions, that the size of the punitive award is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant. See *post*, at 492–494. There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme

Court of Appeals' words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent. 187 W. Va. 457, 477, 467, 419 S. E. 2d 870, 890, 880 (1992). "[T]he record shows that this was not an isolated incident on TXO's part—a mere excess of zeal by poorly supervised, low level employees—but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power." *Id.*, at 468, 419 S. E. 2d, at 881.

Although in many respects this case represents an odd application of an already unusual tort, it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence. I confess to feeling a certain degree of disquiet in affirming this award, but the record, when viewed as a whole, makes it probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice. There was ample evidence of willful and malicious conduct by TXO in this case; the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondents' attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment. Compared with this evidence and argumentation, which dominates the record of the trial, the subtler and more isolated appeals based on TXO's out-of-state status on which JUSTICE O'CONNOR focuses were of lesser importance. A case involving vicarious liability, negligence, or strict liability might present different issues. But given the record here, I am satisfied that the jury's punitive damages award did not amount to an unfair, arbitrary, or irrational seizure of TXO's property.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

The jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the West Virginia Supreme Court of Appeals. Traditional American practice governing the imposition of punitive damages requires no more. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 15 (1991); *id.*, at 26–27 (SCALIA, J., concurring in judgment). It follows, in my view, that petitioner's claims under the Due Process Clause of the Fourteenth Amendment must fail. See *id.*, at 31. I therefore have no difficulty joining the Court's judgment.

I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip:* the existence of a so-called "substantive due process" right that punitive damages be reasonable, see *ante*, at 458.* I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases the plural-

*JUSTICE STEVENS asserts that there is a difference between the constitutional standard that he today proposes, which he describes as "grossly excessive" (a term used in one of the *Lochner*-era cases he relies upon, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909)), and the standard of "reasonableness" that state courts have traditionally applied. *Ante*, at 458–459, n. 24. I doubt whether there is a difference between the two. As JUSTICE O'CONNOR points out, see *post*, at 476–478, state courts often used terms like "grossly excessive" to describe the sort of award that could not stand. But if there *is* a difference, then one must wonder—since it is not based upon any common-law tradition—where the standard of "grossly-excessive-that-means-something-even-worse-than-unreasonable" comes from.

ity relies upon, see *ante*, at 453–454. It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains *that* it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

To say (as I do) that "procedural due process" requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination—which is, in my view, what the plurality tries to assure today. Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering); but no one would claim (or at least no one has yet claimed) that a substantively correct determination of sufficiency of evidence and reasonableness of compensatory damages is a federal constitutional right. So too, I think, with punitive damages: *Judicial* assessment of their reasonableness is a federal right, but a *correct* assessment of their reasonableness is not.

Today's reprise of *Haslip*, despite the widely divergent opinions it has produced, has not been a waste. The procedures approved here, *ante*, at 463–466 (plurality opinion), are far less detailed and restrictive than those upheld in *Haslip*, *supra*, at 19–23, suggesting that if the Court ever does invent new procedural requirements, they will not deviate significantly from the traditional ones that ought to govern. And the disposition of the "substantive due process" claim demonstrates that the Court's "'constitutional sensibilities'" are far more resistant to "'jar[ring],'" *ante*, at 462 (plurality opinion) (quoting *Haslip*, *supra*, at 18), than one might have imagined after *Haslip*. There the Court said a 4-to-1 ratio

between punitive damages and actual damages "may be close to the line" of "constitutional impropriety," *Haslip*, *supra*, at 23–24; today we decide that a *10*-to-1 ratio between punitive damages and *the potential harm of petitioner's conduct* passes muster—calculating that potential harm, very generously, to be more than *50* times the $19,000 in actual damages that respondents suffered, see *ante*, at 460–462 (plurality opinion).

The plurality's decision is valuable, then, in that the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that "this is no worse than *TXO*." I would go further, to shut the door the plurality leaves slightly ajar. As I said in *Haslip*, the Constitution gives federal courts no business in this area, except to assure that due process (*i. e.*, traditional procedure) has been observed. 499 U. S., at 27–28 (opinion concurring in judgment). State legislatures and courts have ample authority to eliminate any perceived "unfairness" in the common-law punitive damages regime, and have frequently exercised that authority in recent years. See *id.*, at 39; Brief for Attorney General of Alabama et al. as *Amici Curiae* 14–17 (collecting state statutes and cases); Brief for National Association of Securities and Commercial Law Attorneys as *Amicus Curiae* 16–30 (same). The plurality's continued assertion that federal judges have *some*, almost-never-usable, power to impose a standard of "reasonable punitive damages" through the clumsy medium of the Due Process Clause serves only to spawn wasteful litigation, and to reduce the incentives for the proper institutions of our society to undertake that task.

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, and with whom JUSTICE SOUTER joins as to Parts II–B–2, II–C, III, and IV, dissenting.

In *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991), this Court held out the promise that punitive damages

awards would receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system. Today the Court's judgment renders *Haslip*'s promise a false one. The procedures that converted this commercial dispute into a $10 million punitive verdict were wholly inadequate. Rather than producing a judgment founded on verifiable criteria, they produced a monstrous award—526 times actual damages and over 20 times greater than any punitive award in West Virginia history. Worse, the State Supreme Court of Appeals rejected petitioner's challenge with only cursory analysis, observing that petitioner, rather than being "really stupid," had been "really mean." 187 W. Va. 457, 474–475, 419 S. E. 2d 870, 887–889 (1992). The court similarly refused to consider the possibility of remittitur because petitioner "and its agents and servants failed to conduct themselves as gentlemen." *Id.*, at 462, 419 S. E. 2d, at 875. In my view, due process does not tolerate such cavalier standards when so much is at stake. Because I believe that neither this award's size nor the procedures that produced it are consistent with the principles this Court articulated in *Haslip*, I respectfully dissent.

I

Our system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Jurors decide not only civil matters, where the financial consequences may be great, but also criminal cases, where the liberty or perhaps life of the defendant hangs in the balance. Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, see U. S. Const., Art. III, §2, Amdts. 6, 7, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. See 3 W. Blackstone, Commentaries *379–*381; *Haslip*, *supra*, at 40 (KENNEDY, J., concurring in judgment);

W. Olson, The Litigation Explosion 175 (1991); Hyman & Tarrant, Aspects of American Trial Jury History, in The Jury System in America 23, 27–28 (R. Simon ed. 1975).

But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges. See H. Kalven & H. Zeisel, The American Jury 497–498 (1966) ("The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude"). Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. Modern judicial systems therefore incorporate safeguards against such influences. Rules of evidence limit what the parties may present to the jury. Careful instructions direct the jury's deliberations. Trial judges diligently supervise proceedings, watchful for potential sources of error. And courts of appeals stand ready to overturn judgments when efforts to ensure fairness have failed.

In the usual case, this elaborate but necessary judicial machinery functions well, ensuring that our jury system is an engine of liberty and justice rather than a source of oppression and arbitrary imposition. As JUSTICE KENNEDY has explained, "[e]lements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts." *Haslip*, 499 U. S., at 40 (opinion concurring in judgment). But the risk of prejudice, bias, and caprice remains a real one in every case nonetheless.

This is especially true in the area of punitive damages, where juries sometimes receive only vague and amorphous guidance. Jurors may be told that punitive damages are im-

posed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist. See, *e. g.*, *id.*, at 39. Although this Court has not held such instructions constitutionally inadequate, it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict. See *id.*, at 43, 63 (O'CONNOR, J., dissenting); *id.*, at 41 (KENNEDY, J., concurring in judgment) ("[T]he generality of the instructions may contribute to a certain lack of predictability"); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 281 (1989) (Brennan, J., concurring) (Such "skeletal" guidance is "scarcely better than no guidance at all," creating a need for more careful review); *Smith* v. *Wade*, 461 U. S. 30, 88 (1983) (REHNQUIST, J., dissenting) (elastic standards applicable to punitive awards "giv[e] free reign to the biases and prejudices of juries"). As one commentator has explained:

> "Like everyone else in the court system, juries need and deserve objective rules for decision. Deprived of any fixed landmarks and guideposts, any of us can be distracted, played on, and befuddled to the point where our best guess is far from reliable." Olson, *supra*, at 175.

It is therefore no surprise that, time and again, this Court and its Members have expressed concern about punitive damages awards "'run wild,'" inexplicable on any basis but caprice or passion. *Haslip*, *supra*, at 9–12, 18 (discussing cases); see also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot

stand. See *Haslip, supra*, at 41 (KENNEDY, J., concurring in judgment) ("A verdict returned by a biased or prejudiced jury no doubt violates due process"). Of course, determining whether a verdict resulted from improper influences is no easy matter. By tradition and necessity, the circumstances in which jurors may impeach their own verdict are quite limited. See *Tanner* v. *United States*, 483 U. S. 107, 117–121, 127 (1987); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810, pp. 71–72 (1973); 2 W. Tidd, Practice of Courts of King's Bench and Common Pleas *908–*909. But fundamental fairness requires that impermissible influences such as bias and prejudice be discovered nonetheless, by inference if not by direct proof. As a result, courts at common law in England traditionally would strike any award that appeared so grossly disproportionate as to evidence caprice, passion, or bias.[1] This practice long has been followed

[1] See *Hewlett* v. *Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C. P. 1813) (Mansfield, C. J.) ("[I]t is now well acknowledged in all the Courts of *Westminsterhall* [that] if the damages are clearly too large, the Courts will send the inquiry to another jury"); *Duberly* v. *Gunning*, 4 Durn. & E. 651, 657 (K. B. 1792) (Buller, J.) ("New trials have been granted from the year 1655" on "the grounds . . . of excessive damages"); *Chambers* v. *Caulfield*, 6 East. 244, 256, 102 Eng. Rep. 1280, 1285 (K. B. 1805) (Lord Ellenborough, C. J.) ("[I]f it appeared to us from the amount of the damages given as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury"); *Leith* v. *Pope*, 2 Bl. W. 1327, 1328, 96 Eng. Rep. 777, 778 (K. B. 1782) (award will be reversed only where "so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury"); *Fabrigas* v. *Mostyn*, 2 Bl. W. 928, 96 Eng. Rep. 549 (K. B. 1774) ("Some [awards] may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury"); *Gilbert* v. *Burtenshaw*, 1 Cowp. 230, 231, 98 Eng. Rep. 1059, 1060 (K. B. 1774) (Court may grant new trial only where damages are so "flagrantly outrageous and extravagant" as to constitute "internal evidence of intemperance in the minds of the jury"); 2 Tidd, Practice of Courts of King's Bench and Common Pleas, at *909 (A new trial may be had "for excessive damages" but "the damages ought not to be weighed

in this Nation as well.[2] Indeed, the New Hampshire Supreme Court emphasized its importance over a century ago, observing that a court's duty to interfere with a disproportionate jury verdict "is absolutely necessary to the safe administration of justice, and ought, in all proper cases, to be asserted and exercised." *Belknap* v. *Boston & Maine R. Co.*, 49 N. H. 358, 372 (1870). Accord, *Gough* v. *Farr*, 1 Y. & J. 477, 479–480, 148 Eng. Rep. 759, 760 (Ex. 1827) (Vaughan, B.) ("It is essential to the due administration of justice, that the Courts should exercise a salutary control over Juries" by requiring retrial where the amount of the verdict indicates that the jury "acted improperly, or upon a gross misconception of the facts"); *id.*, at 478–479, 148 Eng. Rep., at 759–760

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in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury").

[2] G. Field, Law of Damages 685–686 (1876) ("[W]hen the verdict of the jury is so flagrantly excessive that the mind at once perceives that the verdict is unjust, it should be set aside"); *id.*, at 684 (Court may set award aside "where it is apparent, from the amount of the verdict or otherwise, that the jury were influenced by passion, prejudice, corruption, or an evident mistake of the law or the facts"); 1 J. Sutherland, Law of Damages 810 (1882) (Where "the amount is so great or so small as to indicate" that "it is the result of a perverted judgment, and not that of [the jury's] cool and impartial deliberation," the court, "in its discretion, will interpose and set it aside"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N. Y. 1857) (Damages award will be set aside where "so flagrantly outrageous and extravagant" as to evince "intemperance, passion, partiality or corruption"); *Pleasants* v. *Heard*, 15 Ark. 403, 406 (1855) (verdict to be set aside if the "amount of damages, upon all the facts of the case, . . . shocks our sense of justice"); *Worster* v. *Proprietors of Canal Bridge*, 33 Mass. 541, 547–548 (1835) (Court may interfere where damages are "manifestly exorbitant"); *Belknap* v. *Boston & Maine R. Co.*, 49 N. H. 358, 372 (1870) (Where damages are so excessive that one familiar with case would conclude that the "jury . . . acted under the influence of a perverted judgment, it is the duty of the court in the exercise of a sound discretion to grant a new trial"). Accord, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 41 (1991) (KENNEDY, J., concurring in judgment) ("[T]he extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case").

(Alexander, L. C. B.) (Where damages are so excessive that "the Courts are of opinion . . . that the Jury have acted under the influence of undue motives, or of misconception, it is their duty to interfere"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N. Y. 1857) (reciting Lord Ellenborough's view that, "if it appeared from the amount of damages given, as compared with the facts of the case laid before jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception of the subject, the court would have thought it their duty to submit the question to the consideration of a second jury"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (When the punitive damages award is disproportionate, "we feel it our duty to interfere").

Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of proportionality is "deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U. S. 277, 284–285 (1983). See, *e. g.*, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3, 5 (1934) (amercement vacated and bailiff ordered to "take a moderate amercement proper to the magnitude and manner of that offence"); First Statute of Westminster, 3 Edw. I, ch. 6 (1275). Because punitive damages are designed as punishment rather than compensation, *Browning-Ferris*, 492 U. S., at 297 (O'CONNOR, J., concurring in part and dissenting in part) (citing cases), courts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed.[3] This Court similarly has recognized that

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[3] *Ante*, at 459, and n. 25 (plurality opinion) ("[S]tate courts have long held that 'exemplary damages allowed should bear some proportion to the real damage sustained,'" quoting *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852), and citing other cases). See, *e. g.*, *McCarthy* v. *Niskern*, 22 Minn. 90, 91–92 (1875) (Punitive damages "enormously in excess of what may

the requirement of proportionality is implicit in the notion of due process. We therefore have held that an award that is "plainly arbitrary and oppressive," *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482, 491 (1915), "grossly excessive," *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919), offends the Due Process Clause and may not stand.

II

The plurality does not retreat today from our prior statements regarding excessive punitive damages awards. Nor does it deny that our prior decisions have a strong basis in historical practice and the common law. On the contrary, it reaffirms our precedents once again, properly rebuffing respondents' attempt to denigrate them as *Lochner*-era aberra-

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justly be regarded as compensation" for the harm incurred must be set aside "to prevent injustice"); *International & Great Northern R. Co.* v. *Telephone & Telegraph Co.*, 69 Tex. 277, 282, 5 S. W. 517, 518 (1887) (Punitive damages "when allowed should be in proportion to the actual damages sustained" (internal quotation marks omitted)); *Burkett* v. *Lanata*, 15 La. 337, 339 (1860) (Punitive damages should "be commensurate to the nature of the offence"); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N. W. 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (When punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"). See also *Leith* v. *Pope*, *supra*, at 1328, 96 Eng. Rep., at 778 (Court will interfere where damages are "outrageously disproportionate, either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant"); *Duberly* v. *Gunning*, 4 Durn. & E., at 657 (Buller, J.) (The Court has the power to order a new trial where "the damages given are enormously disproportionate to the case proved in evidence"); *Townsend* v. *Hughes*, 2 Mod. *150, *151, 86 Eng. Rep. 994, 995 (C. P. 1677) (Atkins, J.) (court should "consider whether the [offense] and damages bear any proportion; if not, then the Court ought to lay their hands upon the verdict").

tions. *Ante*, at 455. It is thus common ground that an award may be so excessive as to violate due process. *Ibid.* We part company, however, on how to determine if this is such an award.

In Solomonic fashion, the plurality rejects both petitioner's and respondents' proffered approaches, instead selecting a seemingly moderate course. See *ante*, at 456–458. But the course the plurality chooses is, in fact, no course at all. The plurality opinion erects not a single guidepost to help other courts find their way through this area. Rather, quoting *Haslip*'s observation that there is no "'mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,'" *ante*, at 458 (quoting 499 U. S., at 18), the plurality abandons all pretense of providing instruction and moves directly into the specifics of this case.

I believe that the plurality errs not only in its result but also in its approach. Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis. On the contrary, the difficulty of the matter imposes upon us a correspondingly greater obligation to provide the most coherent explanation we can. I agree with the plurality that we ought not adopt TXO's or respondents' suggested approach as a rigid formula for determining the constitutionality of punitive damages verdicts. But it does not follow that, in the course of deciding this case, we should avoid offering even a clue as to our own.

TXO's suggestion that this Court should rely on objective criteria has much to commend it. As an initial matter, constitutional judgments "'should not be, or appear to be, merely the subjective views of individual Justices.'" *Rummel* v. *Estelle*, 445 U. S. 263, 274 (1980) (quoting *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of WHITE, J.)). Without objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal

preference. One judge's excess very well may be another's moderation. To avoid that element of subjectivity, our "'judgment[s] should be informed by objective factors to the maximum possible extent.'" 445 U. S., at 274–275 (quoting same). As the plurality points out, *ante*, at 455–456, TXO directs our attention to various objective indicators, including the relationship between the punitive damages award and compensatory damages, awards of punitive damages upheld against other defendants in the same jurisdiction, awards upheld for similar torts in other jurisdictions, and legislatively designated penalties for similar misconduct. While these factors by no means exhaust the due process inquiry, they are quite probative. It is to their proper application that I now turn.

A

In my view, due process at least requires judges to engage in searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion. As JUSTICE STEVENS observed in a different context, "[o]ne need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging" the constitutionality of a punitive damages verdict "to recognize that the dramatically irregular" size and nature of an award "may have sufficient probative force to call for an explanation." Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 755 (1983) (concurring opinion) (footnotes omitted).

This $10 million punitive award, returned in a case involving only $19,000 in compensatory damages, is a dramatically irregular, if not shocking, verdict by any measure. At the very least it should raise a suspicious judicial eyebrow. Not only does the punitive award represent over 500 times actual damages, but it also exceeds economic harm by over $9.98 million. Thus, it cannot be accepted as bearing the "understandable relationship to compensatory damages," 499 U. S., at 22, the Court found sufficient in *Haslip*. Indeed, in *Has-*

lip the Court observed that an $840,000 punitive award, representing four times compensatory damages, may have been "close to the line" of "constitutional impropriety." *Id.*, at 23–24. If the quadruple damages, $840,000 award in *Haslip* was "close to the line," absent a convincing explanation, this $10 million award—over 500 times actual damages—surely must cross it.

A comparison of this award and prior ones in West Virginia confirms its unusual nature: It is 20 times larger than the highest punitive damages award *ever* upheld in West Virginia history for any misconduct. See App. to Brief for Petitioner 1a–3a (listing punitive damages awards affirmed on appeal in West Virginia). That figure is particularly surprising if one considers the nature of the offense at issue. This is not a case involving grave physical injury imposed on a helpless citizen by a callous malefactor. Rather, it is a business dispute between two companies in the oil and gas industry. TXO was accused of slandering respondents' title to a tract of land—that is, impugning their claim of ownership—in an attempt to win concessions on a pre-existing contract. Although TXO's conduct was clearly wrongful, calculated, and improper, the award in this case cannot be upheld as a reasoned retributive response. Not only is it greatly in excess of the actual harm caused, but it is 10 times greater than the largest punitive damages award for the same tort in any jurisdiction, *id.*, at 5a–8a (listing all recorded punitive damages awards for slander of title affirmed on appeal), and orders of magnitude larger than authorized civil and criminal penalties for similar offenses, see Brief for Petitioner 19, nn. 17–18, and App. to Brief for Petitioner 9a–21a (collecting statutes). By any "objective criteria," *Haslip*, 499 U. S., at 23, the award is "grossly out of proportion to the severity of the offense" and bears no "understandable relationship to compensatory damages," *id.*, at 22. It is, at first blush, an "extreme resul[t] that jar[s] one's constitutional sensibilities." *Id.*, at 18.

That these disproportions might implicate due process concerns the plurality does not deny. Nonetheless, it refuses to "enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards." *Ante*, at 458. I agree with the plurality that, although it might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to "experiment with different methods" of ferreting out impermissible awards "and to adjust these methods over time." *Haslip*, *supra*, at 64 (O'CONNOR, J., dissenting). Nonetheless, I see no reason why this Court or any other would wish to disregard such probative evidence. For example, although retribution is a permissible consideration in assessing punitive damages awards, it is quite difficult to determine whether a particular award can be attributed to that goal; retribution resists quantification. Nonetheless, jury awards in similar cases and the civil and criminal penalties created by the legislature for like conduct can give us some idea of the limits on retribution. Thus, a $5,000 punitive damages award on actual damages of $1 may not seem well proportioned at first blush; but if the legislature has seen fit to impose a $50,000 penalty for that very same conduct, the award might be deemed a reasoned retributive response.

This approach, of course, has its limits. Because no two cases are alike, not all comparisons will be enlightening. See *ante*, at 457–458 (plurality opinion). But recognizing the limits of an approach does not compel us to discard it entirely. I do not see what can be gained by blinding ourselves to the few clear guideposts in an area so painfully bereft of objective criteria. Indeed, JUSTICE STEVENS joined in proposing precisely such an approach to punitive damages under the Eighth Amendment in *Browning-Ferris*, see 492 U. S., at 301 (O'CONNOR, J., joined by STEVENS, J., concurring in part and dissenting in part). Moreover, courts at common law engaged in similar comparisons. See, *e. g.*, *Travis* v. *Barger*,

24 Barb. 614, 629 (N. Y. 1857) (comparing verdicts for similar torts); *International & Great Northern R. Co.* v. *Telephone & Telegraph Co.*, 69 Tex. 277, 282, 5 S. W. 517, 518 (1887) (comparing ratios). In any event, what the comparisons demonstrate in this case is what one might have suspected from the beginning. This award cannot be justified as a reasoned retributive response, for it is notably out of line with the punishment previously imposed by juries or established by statute for similar conduct.

B

That, however, does not end our inquiry. In some cases, the unusual nature of the award will be explained by the peculiar considerations placed before the jury. Indeed, the plurality asserts that such an explanation exists in this case. The award, the plurality explains, may have been based on the profit TXO anticipated or the harm TXO would have imposed on respondents had its scheme been successful. *Ante*, at 459–462.

I have no quarrel with the plurality that, in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant's anticipated gain. Linking the punitive award to those factors not only substantially furthers the State's weighty interests in deterrence and retribution, but also can be traced well back in the common law. See, *e. g.*, *Benson* v. *Frederick*, 3 Burr. 1846, 97 Eng. Rep. 1130 (K. B. 1766) (Wilmot, J.) (damages for ordering the plaintiff flogged by two drummers not excessive even though disproportionate to plaintiff's actual suffering, as "it was rather owing to the lenity of the drummers than of the [defendant] that the [plaintiff] did not suffer *more*"). The plurality's theory, however, bears little relationship to what actually happened in this case.

1

The record demonstrates that the potential harm theory is little more than an after-the-fact rationalization invented by

counsel to defend this startling award on appeal. The $5 to $8.3 million estimate of potential loss that respondents proffer today appears nowhere in the record. No expert or lay witness testified to the jury about any such figure. No one directed the jury's attention to the technical documents or scattered testimony on which respondents now rely. See *ante*, at 450–451, n. 10 (plurality opinion). No one told the jury how to pull all those numbers together to calculate such a figure. In fact, the jury never was told that it was permitted to do so.

Respondents did not even present their $5 to $8.3 million estimate to defend the verdict before the West Virginia Supreme Court of Appeals. Nor did that court rely on such an estimate. Its opinion, which the plurality applauds as "thorough," *ante*, at 465, nowhere suggests that the jury might have based the award on the potential harm to respondents or on TXO's anticipated profit. Rather, its sole reference to potential harm is the "millions of dollars of damages" that might result if TXO *repeated* its misdeeds against *"other victims."* 187 W. Va., at 476, 419 S. E. 2d, at 889 (emphasis added). Virtually any tort, however, can cause millions of dollars of harm if imposed against a sufficient number of victims.

Respondents' $5 to $8.3 million estimate appeared for the first time after this Court granted certiorari, having been produced exclusively for our consumption. As the plurality notes, there is every reason to believe that the figure, derived as it is from a series of extrapolations and economic assumptions never presented to the jury and yet untested by adversary presentation, is unrealistic. See *ante*, at 461. Consequently, the plurality refuses to rely on the figure, instead offering a series of its own estimates. See *ante*, at 462. These estimates also are speculative, however, as the plurality does not indicate how they were derived or where they are supported in the record. The little evidence regarding potential harm the record does yield, it turns out, is

so uncertain and ambiguous that the plurality cannot rely on it, either; to the extent it demonstrates anything at all, it shows respondents' estimate to be exaggerated. See Tr. 100, 103–104.

2

But even if we assume that the plurality's estimates of potential harm are plausible or supported by the evidence, they are, on this record, entirely irrelevant. The question is not simply whether *this Court* might think the award appropriate in light of its estimate of potential harm. The question is also whether *the jury* might have relied on such an estimate rather than some impermissible factor, such as a personal preference for the primarily local plaintiffs as compared to the unsympathetic and wealthy out-of-state defendant, as TXO contends. After all, due process does not simply require that a particular result be substantively acceptable; it also requires that it be reached on the basis of permissible considerations. See *Haslip*, 499 U. S., at 41 (KENNEDY, J., concurring in judgment). In this case, the jury instructions precluded the jury from relying on the potential harm theory the plurality endorses. As a result, that theory can neither explain nor justify the otherwise astonishing verdict the jury returned.

At trial, the jury was instructed to consider numerous factors when setting the punitive damages award, including "'the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances.'" *Ante*, at 463, n. 29 (plurality opinion) (quoting App. 34–35). Nowhere do the instructions mention the alternative measure of potential harm to respondents upon which the plurality relies today.

Of course, the instructions do mention that the goal of punitive damages is deterrence. One therefore might hypothesize that a particularly sophisticated jury would realize that imposing damages in an amount linked to potential harm or

the defendant's expected gain might provide appropriate deterrence. One might even go so far as to suppose that the jury would be daring enough to apply that measure, even though the trial court listed numerous factors, including *actual* harm, but made no mention of *potential* harm. But such speculation has no application in this case, for the jury instructions made it quite clear that deterrence was linked not to an unmentioned factor like potential gain but to a factor the trial court *did* mention—TXO's wealth:

> "'The object of [punitive damages] is to deter TXO Production Corp. and others from committing like offenses in the future. *Therefore* the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.'" *Ante*, at 463, n. 29 (plurality opinion) (quoting App. 35) (emphasis added).

A reasonable juror hearing these instructions would not have felt free to consider the potential harm or expected gain measures the plurality proposes today.

The two passages the plurality excerpts from closing arguments, see *ante*, at 461, do not support the plurality's theory. Respondent Tug Fork Land Company's closing argument does mention that TXO thought the wells would produce "'lot[s] of money.'" *Ibid.* (quoting Tr. 748–749). But that remark had nothing to do with punitive damages. Instead, counsel was addressing the issue of liability: According to him, TXO's desire to obtain all the royalties was the motive for its bad faith conduct. See Tr. 746–749 (TXO slandered respondents' title to lower the value of the property so it could exact concessions or win 100% of royalties by means of a lawsuit). When counsel *did* discuss the appropriate measure of punitive damages, not once did he mention the potential harm to respondents. Instead, he relied exclusively on TXO's vast wealth:

> "His Honor has instructed you that you may award punitive damages and I've indicated to you what punitive damages [are]. *Now, just consider the wealth of this corporation.* [T]he reason for putting in [expert evidence on TXO's resources] is *that's how a jury considers the amount of punitive damages.* This is a multi-million dollar corporation—even a billion dollars in assets. . . . [Think about imposing a punitive award in the range of a] million, twelve million dollars. Those kinds of numbers are not out of line when you talk about a corporation that has assets of something like a billion dollars." *Id.*, at 757–758 (emphases added).

Counsel for respondent Alliance Resources Corp. similarly did not argue that punitive damages should be linked to potential harm. He did mention that TXO anticipated a large profit from its nefarious scheme. See *id.*, at 779–780; *ante*, at 461 (plurality opinion). But counsel once again made no attempt to quantify TXO's potential gain. Nor did he encourage the jury to base the punitive damages award on TXO's expected profit. Instead, counsel argued only *one* measure for punitive damages—TXO's wealth:

> "A two billion dollar company. Ha[s] earnings of $225,000,000, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair . . . ." Tr. 781.

The portion of counsel's argument the plurality relies upon, *ante*, at 461, turns out to be a transition between a discussion of TXO's conduct and a plea for the jury to award punitive damages based exclusively on TXO's wealth. Immediately after delivering the portion of the argument the plurality reproduces—in which counsel told the jury that the punishment should "'fit'" the scheme and "'fit the wealth,'" *ibid.*—he asked rhetorically, "Now, how much is the wealth?" Tr. 780. It was then that he told the jury, in great detail, about

TXO's vast resources. At no point, however, did counsel ask rhetorically, "Now, how much was the potential profit?" At no point did he answer that question. Nor did he ever suggest that the jury calculate potential harm or base its punitive damages award thereon. Instead, like cocounsel before him, he relied exclusively on TXO's wealth. See *id.*, at 781–782.

I am therefore unpersuaded by the plurality's assertion that this award may be upheld based on the potential harm to respondents or TXO's potential gain. That theory was not available to the jury under the court's instructions. It was not one supported by evidence on which the jury might have relied. And it is not one that trial counsel chose to promote. It was instead an after-the-fact rationalization invented by appellate counsel who could not otherwise explain this disproportionate award.

C

There is another explanation for the verdict, but it is not one that permits affirmance. As I read the record in this case, it seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation.

In *Haslip*, this Court considered jury instructions that differed from those used here in two material respects. First, unlike the instructions in *Haslip*, which did not permit the jury to consider the defendant's wealth, the instructions in this case specifically directed the jury to take TXO's wealth into account. The plurality concedes that introducing TXO's wealth into the calculus "increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is," as here, "a nonresident." *Ante*, at 464. Second, the instructions directed the jury to impose punitive damages "'to provide additional compensation for the conduct to which the injured parties have been subjected.'" *Ante*, at 463, n. 29

(plurality opinion) (quoting App. 34). The latter instruction, of course, is without legal meaning. *Ante*, at 464 (plurality opinion) (We do "not understand the reference . . . to 'additional compensation' "). Plaintiffs are compensated for injuries they have suffered; one cannot speak of "additional compensation" unless it is linked to some additional harm.

To a juror, however, compensation is the money it awards the plaintiff; "additional compensation," if not linked to a particular measure of harm, is simply additional money the jury gives to the plaintiff. As a result, the "additional compensation" instruction, considered together with the instruction directing the jury's attention to TXO's massive wealth, encouraged the jury to transfer some of TXO's impressive wealth to the smaller and more sympathetic respondents as undifferentiated "additional compensation"—for any reason, or no reason at all. In fact, the instructions practically ensured that this would occur. They provided the jury with only two objective factors on which to rely. See *supra*, at 486 (citing jury instructions). The first was actual harm, a relatively small sum on which the jury obviously did not rely; the second was TXO's wealth, a factor that obviously impressed the jury a great deal. Thus, unlike the instructions in *Haslip*, these instructions did not prevent respondents from "enjoy[ing] a windfall because they have the good fortune to have a defendant with a deep pocket." 499 U. S., at 22. Instead, they ensured that a windfall verdict would result by inviting the jury to redistribute wealth to respondents as undifferentiated "additional compensation," based solely on TXO's financial position.

That a jury might have such inclinations should come as no surprise. Courts long have recognized that jurors may view large corporations with great disfavor. See, *e. g.*, *Illinois Central R. Co.* v. *Welch*, 52 Ill. 183, 188 (1869) ("[J]uries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It

is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we cannot close our eyes to the fact"). Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs. Brickman, The Asbestos Litigation Crisis, 13 Cardozo L. Rev. 1819, 1849, n. 128 (1992); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 61–62 (1982); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 45–46 (1982) (jury assessing punitive damages against multimillion dollar corporation forced to think of an award measuring seven, eight, or nine figures); see also *supra*, at 474–475 (juror discretion in awarding punitive damages not limited); cf. *Smith* v. *Covell*, 100 Cal. App. 3d 947, 960, 161 Cal. Rptr. 377, 385 (1980) (juror impressed with idea that plaintiffs had money and "'didn't need anymore'").

This is not to say that consideration of a defendant's wealth is unconstitutional. To be sure, there are strong economic arguments that permitting juries to consider wealth is unwise if not irrational, see Abraham & Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Studies 415 (1989), especially where the defendant is a corporation, *id.*, at 421–422; cf. *Zazú Designs* v. *L'Oréal, S. A.*, 979 F. 2d 499, 508–509 (CA7 1992) (Easterbrook, J.). But, "[j]ust as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics, see *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting)," it does not require us to adopt the views of the Law and

Economics school either. As a historical matter, the wealth of the perpetrator long has been thought relevant. See *Browning-Ferris*, 492 U. S., at 300 (O'CONNOR, J., concurring in part and dissenting in part) (citing the Magna Carta and Blackstone's Commentaries). Moreover, *Haslip* itself suggests that the defendant's wealth is a permissible consideration, *ante*, at 462, n. 28, 464 (plurality opinion), although it does so only in the context of *appellate* review. See 499 U. S., at 22.

Nonetheless, courts must have authority to recognize the special danger of bias that such considerations create. The plurality does just that today, *ante*, at 464, as this Court, other tribunals, and numerous commentators have before. See, *e. g.*, Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function"); Abraham & Jeffries, *supra*, at 424; *Illinois Central R. Co.*, *supra*, at 188 (bias against railroads); *McConnell* v. *Hampton*, 12 Johns. 234, 236 (N. Y. 1815) (Thompson, C. J.) (jury unduly influenced by defendant's great wealth); cf. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981) ("[E]vidence of a [municipality's wealth, inasmuch as it has unlimited taxing power], may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial"); see also *Haslip*, 499 U. S., at 43 (O'CONNOR, J., dissenting) (jurors, if not properly guided, may "target unpopular defendants . . . and redistribute wealth").

The risk of prejudice was especially grave here. The jury repeatedly was told of TXO's extraordinary resources, which respondents estimated at $2 billion. To make matters

worse, unlike the jurors or the primary plaintiffs, TXO was not from West Virginia. It was an interloper, from the large State of Texas. As the Supreme Court of Appeals of West Virginia has recognized, the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong. See *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 665, 413 S. E. 2d 897, 906 (1991) (Excess jury discretion "[i]nevitably . . . leads to increasing efforts to redistribute wealth from without the state to within"; cases involving large awards typically pit local plaintiffs against "out-of-state (often faceless, publicly held) corporations"). That court speaks from experience. The three highest punitive damages awards ever affirmed in West Virginia, including this one, were assessed against relatively wealthy out-of-state defendants. *Jarvis* v. *Modern Woodmen of America*, 185 W. Va. 305, 406 S. E. 2d 736 (1991); *Berry* v. *Nationwide Mutual Fire Ins. Co.*, 181 W. Va. 168, 381 S. E. 2d 367 (1989).

Counsels' arguments, however, converted that grave risk of prejudice into a near certainty. Repeatedly they reminded the jury that TXO was from another State. Repeatedly they told the jury about TXO's massive wealth. And repeatedly they told the jury that it could do anything it thought "fair." The opening line from rebuttal set the tone. "Ladies and gentleman of the jury," one attorney began, "this greedy bunch from down in Texas still doesn't understand this case." Tr. 773. Playing on images of Texans as overrich gamblers who profit by chance rather than work, he referred to TXO shortly thereafter as a bunch of "Texas high rollers, wildcatters." *Id.*, at 777. Finally, counsel drove the point home yet one more time, comparing TXO to an obviously wealthy out-of-town visitor who refuses to put money in the parking meter to help pay for community service:

> "Well, what is fair? . . . If someone *comes to town* and intentionally doesn't put a quarter in the meter, stays

> here all day, [in this] *town that needs it to pay for the police force and the fire department*, they give [him] a fine. And at the end of the day [he] may have to pay a dollar. That person reaches in his billfold at the end of the day and maybe *he's got a hundred bucks in there.* He doesn't want to have to pay that dollar, but he does, because he knows if he doesn't [he'll have legal problems]. . . . The town didn't take everything from the individual, didn't ruin [him], just took one percent of what that person had in cash. One percent. *You can fine TXO one percent if you want, you can fine them one dollar if you want.* But I submit to you a one percent fine, the same as John Doe on this street, would be fair. *That's twelve and a half million dollars, based on what they had left over. And their earnings w[ere] $225,000,000.00 [per year].* I mean, yeah, their cash flow. Their surplus. So anything between twelve and a half million and twenty-two million is only one percent—the same as this poor guy who just tried to cheat a little bit. Now that's a lot of money. I hope, like I said, you *don't analyze this on a lot or a little, but fair.*" *Id.*, at 781–782 (emphases added).

Over and over respondents' lawyers reminded the jury that there were virtually no substantive limits on its discretion. Time and again they told the jury of TXO's great wealth and that it could take away any amount it wanted, as long as it seemed "fair." *Id.*, at 781 ("It isn't really whether the verdict is too large or too small, too big or too little. It's whether it's fair"); *ibid.* ("A two billion dollar company. Have earnings of $225,000,000.00, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair . . ."). And each time the argument found solid support in the trial court's instructions, which not only licensed the jury to afford respondents

any "additional compensation" they believed appropriate, but also encouraged them to do so based on TXO's wealth alone.

Given the absence of another plausible explanation for this monumentally large punitive damages award, I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources. The plurality acknowledges this possibility, see *ante*, at 464, but refuses to address it. TXO, the plurality contends, failed to press its objections to the jury instructions in the state court below. *Ibid.* I disagree. TXO's brief specifically argued that the jury instructions did not meet the "*Haslip* standards and [were] not constitutionally permissible." Brief for Appellant in No. 20281 (W. Va.), p. 48; see *id.*, at 44–46 (jury instructions insufficient under *Garnes* v. *Fleming Landfill, Inc.*, *supra*, a recent West Virginia Supreme Court of Appeals decision interpreting *Haslip*). The State Supreme Court of Appeals so understood TXO's challenge. See 187 W. Va., at 473–477, 419 S. E. 2d, at 886–890.

Of course, TXO did not make precisely the same arguments it makes here. But it was not required to. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992). There can be little doubt that TXO argued below that the punitive damages award was excessive; there can be little doubt that TXO identified the jury instructions as being partially responsible. TXO ought not be precluded from fully presenting its arguments here. Because those arguments demonstrate that this award was based on considerations inconsistent with due process, I would reverse the judgment below so the matter could be submitted to the consideration of a second jury.

III

Confronted by a $10 million verdict on damages of $19,000, the State Supreme Court of Appeals in this case did not en-

gage in searching review. Instead it added insult to injury, applying cavalier standards in the course of a cursory examination of the case. Because the review afforded TXO was insufficient to conform with the criteria this Court approved in *Haslip*, the case at least should be remanded for constitutionally adequate postverdict review.

A

Two Terms ago, this Court in *Haslip* upheld Alabama's punitive damages regime against constitutional challenge. Although the Court recognized that juries in Alabama receive limited instructions regarding punitive damages, see 499 U. S., at 6, n. 1, 19–20, it was reassured by the fact that the Alabama courts subject punitive verdicts to exacting postverdict review at two different levels. First, Alabama trial courts must indicate on the record their "'reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness.'" *Id.*, at 20 (quoting *Hammond* v. *Gadsden*, 493 So. 2d 1374, 1379 (1986)). Second, the Alabama Supreme Court itself provides an additional "check" by conducting comparative analysis and applying detailed substantive standards—seven in all—thereby "ensur[ing] that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence." 499 U. S., at 21 (internal quotation marks omitted). Specifically, the Alabama Supreme Court examines:

> "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial

> position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." *Id.*, at 21–22.

In *Haslip*, the Court concluded that application of those standards "imposes a sufficiently definite and meaningful constraint" on factfinder discretion. *Id.*, at 22. Because the standards had a "real effect," *ibid.*, the Court upheld Alabama's regime against constitutional challenge despite the relatively sparse guidance it afforded juries.

As the plurality admits, *ante*, at 463–464, the jury instructions used here were not dissimilar to those employed in *Haslip*. Unlike *Haslip*, however, the verdict they produced was not subjected to post-trial review sufficient to impose a "meaningful constraint" on factfinder discretion. Indeed, the post-trial review offered here bears no resemblance to that approved in *Haslip*. In contrast to the trial judge in *Haslip*, the trial judge here made no written findings. Nor did he announce why he believed—or even if he believed—that the amount of damages bore a reasonable or recognizable relationship to actual damages or any other relevant measure. Instead, ruling from the bench, the trial judge summarily denied TXO's motions seeking reduction or elimination of the punitive damages award.

More important, the Supreme Court of Appeals of West Virginia did not do much better. At the outset, it refused to consider the possibility of remittitur because TXO "and its agents and servants failed to conduct themselves as gentlemen." 187 W. Va., at 462, 419 S. E. 2d, at 875. Proceeding to the question whether the award of punitive damages should be stricken as excessive, the court distinguished between two categories of defendants: those who are "really stupid" and those who are "really mean." *Id.*, at 474–476, 419 S. E. 2d, at 887–889. If the defendant is "really stupid,"

the court explained, "the outer limit of punitive damages is" generally about "five to one." *Id.*, at 476, 419 S. E. 2d, at 889. For the "really mean" defendant, however, "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional." *Ibid.* TXO, it seems, was not really stupid but "really mean." The Supreme Court of Appeals affirmed the $10 million punitive award even though it was 526 times greater than compensatory damages.

Reference to categories like "really stupid" and "really mean" are a caricature of the difficult task of determining whether an award may be upheld consistent with due process. It is simply not enough to observe that the conduct was malicious and conclude that, as a result, the sky (or 500 times compensatory damages) is the limit. But cf. *ante*, at 468–469 (KENNEDY, J., concurring in part and concurring in judgment) (so concluding solely because the conduct was malicious and the defendant rich). Instead, post-trial review must be sufficient to "ensur[e] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to" some measure of harm. *Haslip*, *supra*, at 22. Aside from its two-page dissertation on the difference between "really stupid" and "really mean," however, the State Supreme Court of Appeals offered only three conclusory sentences in a single paragraph to bolster its conclusion that the damages here were not excessive. See *ante*, at 453 (plurality opinion) (citing 187 W. Va., at 476, 419 S. E. 2d, at 889). Because I believe that such cursory review is inconsistent with this Court's decision in *Haslip*, I cannot join my colleagues in affirming.

B

That the Supreme Court of Appeals would engage in such cursory review is something of a surprise. In *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991), that court demonstrated concern for the due process implications of punitive awards. Holding that West Virgin-

ia's previous punitive damages regime was constitutionally suspect in light of *Haslip*, it required trial courts to instruct juries on numerous factors relevant to the measure of punitive damages, see 186 W. Va., at 667–668, 413 S. E. 2d, at 908–909; it mandated that trial courts conduct extensive review and articulate reasons for their decisions on the record, *id.*, at 668–669, 413 S. E. 2d, at 909–910; and it announced that it would apply the factors approved in *Haslip* in its own review, 186 W. Va., at 669, 413 S. E. 2d, at 910.

Unfortunately for TXO, *Garnes* was decided after TXO's trial took place. Although the Supreme Court of Appeals recognized that TXO had not received the benefit of *Garnes*' and *Haslip*'s protections, it refused to remand the case. Instead, the court indicated that it would be "especially diligent" in reviewing this award; it went on to recite language from both *Haslip* and *Garnes*. It is therefore clear that *Haslip* still governs punitive damages awards in West Virginia. As a result, the plurality perhaps declines to reverse because it believes that the Supreme Court of Appeals' failure to follow *Haslip* here is of little consequence to anyone but TXO. After all, a decision of this Court requiring more searching review would alter only the result in this particular case and perhaps a few like it, without changing the law, even in West Virginia.

If the plurality is in fact proceeding on such an assumption, I believe it is mistaken. While this Court has the ultimate power to interpret the Constitution, we grant review in only a small number of cases. We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. But the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming. *Amici* recite case after case in which review has been inadequate or absent altogether. See, *e. g.*, Brief for Phillips Petroleum Co. et al. as *Amici Curiae* 20–27. The Supreme

Court of Appeals of West Virginia, at the same time it recognized *Haslip* as law, itself warned:

> "[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *Garnes, supra,* at 666, 413 S. E. 2d, at 907 (footnote omitted).

I fear that the Supreme Court of Appeals followed such a course in this case. By affirming the judgment nonetheless, today's decision renders the meaningful appellate review contemplated in *Haslip* illusory; courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether.

IV

As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Ellis, 56 S. Cal. L. Rev., at 2. Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919 (1989). And it appears that the upward trajectory continues unabated. See Volz & Fayz, Punitive Damages and the Due Process Clause: The Search for Constitutional Standards, 69 U. Det. Mercy L. Rev. 459, 462, n. 17 (1992). The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability. On the contrary, although some courts have made genuine efforts at reform, many courts

continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias. This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results. In my view, today's decision fails to make good on that promise. I therefore respectfully dissent.

Syllabus

ST. MARY'S HONOR CENTER ET AL. *v.* HICKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–602. Argued April 20, 1993—Decided June 25, 1993

Petitioner halfway house employed respondent Hicks as a correctional officer and later a shift commander. After being demoted and ultimately discharged, Hicks filed suit, alleging that these actions had been taken because of his race in violation of, *inter alia*, § 703(a)(1) of Title VII of the Civil Rights Act of 1964. Adhering to the allocation of the burden of production and the order for the presentation of proof in Title VII discriminatory-treatment cases that was established in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, the District Court found that Hicks had established, by a preponderance of the evidence, a prima facie case of racial discrimination; that petitioners had rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for their actions; and that petitioners' reasons were pretextual. It nonetheless held that Hicks had failed to carry his ultimate burden of proving that the adverse actions were racially motivated. In setting aside this determination, the Court of Appeals held that Hicks was entitled to judgment as a matter of law once he proved that all of petitioners' proffered reasons were pretextual.

Held: The trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law. Pp. 505–525.

(a) Under *McDonnell Douglas*, once Hicks established, by a preponderance of the evidence, a prima facie case of discrimination, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252–253, a presumption arose that petitioners unlawfully discriminated against him, *id.*, at 254, requiring judgment in his favor unless petitioners came forward with an explanation. This presumption placed upon petitioners the burden of producing evidence that the adverse actions were taken for legitimate, nondiscriminatory reasons, which, *if believed by the trier of fact*, would support a finding that unlawful discrimination did not cause their actions. *Id.*, at 254–255, and n. 8. However, as in the case of all presumptions, see Fed. Rule Evid. 301, the ultimate burden of persuasion remained at all times with Hicks, 450 U. S., at 253. The Court of Appeals erred when it concluded that the trier of fact's disbelief of petitioners' proffered reasons placed petitioners in the same position as if they had remained silent in the face of Hicks' prima facie case of

Syllabus

racial discrimination. Petitioners' production of evidence of nondiscriminatory reasons, whether ultimately persuasive or not, satisfied their burden of production and rebutted the presumption of intentional discrimination. The *McDonnell Douglas* framework then became irrelevant, and the trier of fact was required to decide the ultimate question of fact: whether Hicks had proved that petitioners intentionally discriminated against him because of his race. Compelling judgment for Hicks would disregard the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and would ignore the admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion. Pp. 505–512.

(b) This Court has no authority to impose liability upon an employer for alleged discriminatory employment practices unless the factfinder determines that the employer has unlawfully discriminated. Nor may the Court substitute for that required finding the much different and much lesser finding that the employer's explanation of its action was not believable. Any doubt created by a dictum in *Burdine* that falsity of the employer's explanation is alone enough to sustain a plaintiff's case was eliminated by *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714. Pp. 512–520.

(c) The concerns of the dissent and respondent that this decision will produce dire practical consequences are unfounded. Pp. 520–525.

970 F. 2d 487, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which WHITE, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 525.

Gary L. Gardner, Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the brief were *Jeremiah W. Nixon*, Attorney General, and *Don M. Downing*, Deputy Attorney General.

Charles R. Oldham argued the cause for respondent. With him on the brief were *Elaine R. Jones*, *Charles Stephen Ralston*, *Eric Schnapper*, and *Louis Gilden*.

Edward C. DuMont argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Turner*, *Edwin S. Kneedler*,

David K. Flynn, Rebecca K. Troth, Donald R. Livingston, and *Gwendolyn Young Reams.**

JUSTICE SCALIA delivered the opinion of the Court.

We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U. S. C. § 2000e–2(a)(1), the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.

I

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat, Robin S. Conrad,* and *Mona C. Zeiberg;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for the National Association of Manufacturers by *Glen D. Nager* and *Jan S. Amundson;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo, Richard A. Samp,* and *Hugh Joseph Beard, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Lawyer's Committee for Civil Rights under Law et al. by *Herbert M. Wachtell, William H. Brown III, Norman Redlich, Thomas J. Henderson, Richard T. Seymour, Colleen McMahon, Melissa T. Rosse, Isabelle Katz Pinzler, Steven R. Shapiro, Donna R. Lenhoff, Cathy Ventrell-Monsees, Antonia Hernandez,* and *E. Richard Larson;* and for the National Employment Lawyers Association by *Janette Johnson.*

Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official logbook on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1), and that petitioner Long violated Rev. Stat. § 1979, 42 U. S. C. § 1983, by demoting and then discharging him because of his race. After a full bench trial, the District Court found for petitioners. 756 F. Supp. 1244 (ED Mo. 1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F. 2d 487 (1992), and we granted certiorari, 506 U. S. 1042 (1993).

II

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U. S. C. § 2000e–2(a).

With the goal of "progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 255, n. 8 (1981), our opinion in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases.[1] The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "prima facie" case of racial discrimination. *Burdine, supra*, at 252–253. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in *McDonnell Douglas, supra*, at 802) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. 756 F. Supp., at 1249–1250.

Under the *McDonnell Douglas* scheme, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine, supra*, at 254. To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, Federal Evidence § 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an expla-

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[1] The Court of Appeals held that the purposeful-discrimination element of respondent's § 1983 claim against petitioner Long is the same as the purposeful-discrimination element of his Title VII claim against petitioner St. Mary's. 970 F. 2d 487, 490–491 (CA8 1992). Neither side challenges that proposition, and we shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U. S. C. § 1983. Cf. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 186 (1989) (applying framework to claims under 42 U. S. C. § 1981).

nation to rebut the prima facie case—*i. e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *Burdine*, 450 U. S., at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254–255, and n. 8. It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U. S., at 253. In this regard it operates like all presumptions, as described in Federal Rule of Evidence 301:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Respondent does not challenge the District Court's finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. 756 F. Supp., at 1250. Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U. S., at 255, and "drops from the case," *id.*, at 255, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate,"

through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," *id.*, at 256, and that race was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *Ibid.*

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's co-workers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F. Supp., at 1250–1251. It nonetheless held that respondent had failed to carry his ultimate burden of proving that *his race* was the determining factor in petitioners' decision first to demote and then to dismiss him.[2] In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.*, at 1252.

The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F. 2d, at 492. The Court of Appeals reasoned:

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[2] Various considerations led it to this conclusion, including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that "the number of black employees at St. Mary's remained constant." 756 F. Supp., at 1252.

> "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." *Ibid.*

That is not so. By producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position than if they had remained silent."

In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage. At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—*i. e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials). See F. James & G. Hazard, Civil Procedure § 7.9, p. 327 (3d ed. 1985); 1 Louisell & Mueller, Federal Evidence § 70, at 568. If the defendant has failed to sustain its burden but reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a prima facie

case, then a question of fact *does* remain, which the trier of fact will be called upon to answer.[3]

If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U. S., at 254. The presumption, having fulfilled its role of forcing the de-

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[3] If the finder of fact answers affirmatively—if it finds that the prima facie case *is* supported by a preponderance of the evidence—it *must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254, and n. 7 (1981); F. James & G. Hazard, Civil Procedure § 7.9, p. 327 (3d ed. 1985); 1 D. Louisell & C. Mueller, Federal Evidence § 70, pp. 568–569 (1977). Thus, the *effect* of failing to produce evidence to rebut the *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), presumption is not felt until the prima facie case has been *established*, either as a matter of law (because the plaintiff's facts are uncontested) or by the factfinder's determination that the plaintiff's facts are supported by a preponderance of the evidence. It is thus technically accurate to describe the sequence as we did in *Burdine:* "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 450 U. S., at 252–253 (internal quotation marks omitted). As a practical matter, however, and in the real-life sequence of a trial, the defendant *feels* the "burden" not when the plaintiff's prima facie case is *proved*, but as soon as evidence of it is *introduced*. The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it *unless* the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder. It is this practical coercion which causes the *McDonnell Douglas* presumption to function as a means of "arranging the presentation of evidence," *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988).

fendant to come forward with some response, simply drops out of the picture. *Id.*, at 255. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved "that the defendant intentionally discriminated against [him]" because of his race, *id.*, at 253. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination,[4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F. 2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." See, *e. g.*, *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 716 (1983) (citing *Burdine*, *supra*, at 256); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 187 (1989); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 245–246 (1989) (plurality opinion of Brennan, J., joined by Marshall, BLACKMUN, and STEVENS, JJ.); *id.*, at 260 (WHITE, J., concurring in judgment); *id.*, at 270 (O'CONNOR, J., concurring in judgment);

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[4] Contrary to the dissent's confusion-producing analysis, *post*, at 535–536, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 515, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at 519. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

id., at 286–288 (KENNEDY, J., joined by THE CHIEF JUSTICE and SCALIA, J., dissenting); *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 875 (1984); cf. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 659–660 (1989); *id.*, at 668 (STEVENS, J., dissenting); *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988).

III

Only one unfamiliar with our case law will be upset by the dissent's alarum that we are today setting aside "settled precedent," *post*, at 525, "two decades of stable law in this Court," *ibid.*, "a framework carefully crafted in precedents as old as 20 years," *post*, at 540, which "Congress is [aware]" of and has implicitly approved, *post*, at 542. Panic will certainly not break out among the courts of appeals, whose divergent views concerning the nature of the supposedly "stable law in this Court" are precisely what prompted us to take this case—a divergence in which the dissent's version of "settled precedent" cannot remotely be considered the "prevailing view." Compare, *e. g.*, *EEOC* v. *Flasher Co.*, 986 F. 2d 1312, 1321 (CA10 1992) (finding of pretext does not mandate finding of illegal discrimination); *Galbraith* v. *Northern Telecom, Inc.*, 944 F. 2d 275, 282–283 (CA6 1991) (same) (opinion of Boggs, J.), cert. denied, 503 U. S. 945 (1992); 944 F. 2d, at 283 (same) (opinion of Guy, J., concurring in result); *Samuels* v. *Raytheon Corp.*, 934 F. 2d 388, 392 (CA1 1991) (same); *Holder* v. *City of Raleigh*, 867 F. 2d 823, 827–828 (CA4 1989) (same); *Benzies* v. *Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F. 2d 146, 148 (CA7) (same) (dictum), cert. denied, 483 U. S. 1006 (1987); *Clark* v. *Huntsville City Bd. of Ed.*, 717 F. 2d 525, 529 (CA11 1983) (same) (dictum), with *Hicks* v. *St. Mary's Honor Center*, 970 F. 2d, at 492–493 (case below) (finding of pretext mandates finding of illegal discrimination), cert. granted, 506 U. S. 1042 (1993); *Tye* v. *Board of Ed. of Polaris Joint Vocational School Dist.*, 811 F. 2d 315, 320 (CA6) (same), cert.

denied, 484 U. S. 924 (1987); *King* v. *Palmer*, 250 U. S. App. D. C. 257, 260, 778 F. 2d 878, 881 (1985) (same); *Duffy* v. *Wheeling Pittsburgh Steel Corp.*, 738 F. 2d 1393, 1395–1396 (CA3) (same), cert. denied, 469 U. S. 1087 (1984); *Lopez* v. *Metropolitan Life Ins. Co.*, 930 F. 2d 157, 161 (CA2) (same) (dictum), cert. denied, 502 U. S. 880 (1991); *Caban-Wheeler* v. *Elsea*, 904 F. 2d 1549, 1554 (CA11 1990) (same) (dictum); *Thornbrough* v. *Columbus & Greenville R. Co.*, 760 F. 2d 633, 639–640, 646–647 (CA5 1985) (same) (dictum). We mean to answer the dissent's accusations in detail, by examining our cases, but at the outset it is worth noting the utter implausibility that we would ever have held what the dissent says we held.

As we have described, Title VII renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). Here (in the context of the now-permissible jury trials for Title VII causes of action) is what the dissent asserts we have held to be a proper assessment of liability for violation of this law: Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group*, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under *McDonnell Douglas*, the plaintiff has a prima facie case, see 411 U. S., at 802, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the

mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be *incorrect*, they must assess damages against the company, *whether or not they believe the company was guilty of racial discrimination.* The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence."[5] 450 U. S., at 256. Surely nothing short of inescapable prior *holdings* (the dissent does not pretend there are any) should make one assume that this is the law we have created.

We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.* We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) find-

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[5] The dissent has no response to this (not at all unrealistic) hypothetical, except to assert that *surely* the employer must have "personnel records" to which it can resort to demonstrate the reason for the failure to hire. The notion that every reasonable employer keeps "personnel records" on people who never became personnel, showing *why* they did not become personnel (*i. e.*, in what respects all other people who were hired were better) seems to us highly fanciful—or for the sake of American business we hope it is. But more fundamentally, the dissent's response misses the point. Even if such "personnel records" *do* exist, it is a mockery of justice to say that if the jury believes the reason they set forth is probably not the "true" one, all the other utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration.

ing that the employer's explanation of its action was not believable. The dissent's position amounts to precisely this, *unless* what is required to establish the *McDonnell Douglas* prima facie case is a degree of proof so high that it would, in absence of rebuttal, require a directed verdict for the plaintiff (for in that case proving the employer's rebuttal noncredible would leave the plaintiff's directed-verdict case in place, and compel a judgment in his favor). Quite obviously, however, what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands. The dissent is thus left with a position that has no support in the statute, no support in the reason of the matter, no support in any holding of this Court (that is not even contended), and support, if at all, only in the dicta of this Court's opinions. It is to those that we now turn—begrudgingly, since we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.

The principal case on which the dissent relies is *Burdine*. While there are some statements in that opinion that could be read to support the dissent's position, all but one of them bear a meaning consistent with our interpretation, and the one exception is simply incompatible with other language in the case. *Burdine* describes the situation that obtains after the employer has met its burden of adducing a nondiscriminatory reason as follows: "Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." 450 U. S., at 253. The dissent takes this to mean that if the plaintiff proves the asserted reason to be *false*, the plaintiff wins. But a reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. *Burdine*'s later allusions to

proving or demonstrating simply "pretext," *e. g.*, *id.*, at 258, are reasonably understood to refer to the previously described pretext, *i. e.*, "pretext for discrimination."[6]

Burdine also says that when the employer has met its burden of production "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. The dissent takes this to mean that the factual inquiry reduces to whether the employer's asserted reason is true or false—if false, the defendant loses. But the "new level of specificity" may also (as we believe) refer to the fact that the inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced.

In the next sentence, *Burdine* says that "[p]lacing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.*, at 255–256. The dissent thinks this means that the only factual issue remaining in the case is whether the employer's reason is false. But since in our view "pretext" means "pretext for discrimination," we think the sentence must be understood as addressing the form rather than the substance of the defendant's production burden: The requirement that the employer "clearly set forth" its reasons, *id.*, at 255, gives the plaintiff a "full and fair" rebuttal opportunity.

A few sentences later, *Burdine* says: "[The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of inten-

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[6] The same is true of *McDonnell Douglas*'s concluding summary of the framework it created (relied upon by the dissent, *post*, at 530) to the effect that if the plaintiff fails to show "pretext," the challenged employment action "must stand." 411 U. S., at 807. There, as in *Burdine*, "pretext" means the pretext required earlier in the opinion, viz., "pretext for the sort of discrimination prohibited by [Title VII]," 411 U. S., at 804.

tional discrimination." *Id.*, at 256. The dissent takes this "merger" to mean that "the ultimate burden of persuading the court that she has been the victim of intentional discrimination" is *replaced* by the mere burden of "demonstrat[ing] that the proffered reason was not the true reason for the employment decision." But that would be a merger in which the little fish swallows the big one. Surely a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.

Finally, in the next sentence *Burdine* says: "[The plaintiff] may succeed in this [*i. e.*, in persuading the court that she has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U. S., at 804–805." *Ibid.* We must agree with the dissent on this one: The words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff. The problem is that that dictum contradicts or renders inexplicable numerous other statements, both in *Burdine* itself and in our later case law—commencing with the very citation of authority *Burdine* uses to support the proposition. *McDonnell Douglas* does *not* say, at the cited pages or elsewhere, that all the plaintiff need do is disprove the employer's asserted reason. In fact, it says just the opposite: "[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection *were in fact a coverup for a racially discriminatory decision.*" 411 U. S., at 805 (emphasis added). "We . . . insist that respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence *that whatever the stated reasons for his rejection, the decision was in reality*

racially premised." *Id.*, at 805, n. 18 (emphasis added). The statement in question also contradicts *Burdine*'s repeated assurance (indeed, its holding) regarding the burden of persuasion: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U. S., at 253. "The plaintiff retains the burden of persuasion." *Id.*, at 256.[7] And lastly, the statement renders inexplicable *Burdine*'s explicit reliance, in describing the shifting burdens of *McDonnell Douglas*, upon authorities setting forth the classic law of presumptions we have described earlier, including Wigmore's Evidence, 450 U. S., at 253, 254, n. 7, 255, n. 8, James' and Hazard's Civil Procedure, *id.*, at 255, n. 8, Federal Rule of Evidence 301, *ibid.*, Maguire's Evidence, Common Sense and Common Law, *ibid.*, and Thayer's Preliminary Treatise on Evidence, *id.*, at 255, n. 10. In light of these inconsistencies, we think that the dictum at issue here must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent.

In sum, our interpretation of *Burdine* creates difficulty with one sentence; the dissent's interpretation causes many portions of the opinion to be incomprehensible or deceptive. But whatever doubt *Burdine* might have created was eliminated by *Aikens*. There we said, in language that cannot reasonably be mistaken, that "the ultimate question [is] discrimination *vel non*." 460 U. S., at 714. Once the defend-

[7] The dissent's reading leaves *some* burden of persuasion on the plaintiff, to be sure: the burden of persuading the factfinder that the employer's explanation is not true. But it would be beneath contempt for this Court, in a unanimous opinion no less, to play such word games with the concept of "leaving the burden of persuasion upon the plaintiff." By parity of analysis, it could be said that holding a criminal defendant guilty unless he comes forward with a credible alibi does not shift the ultimate burden of persuasion, so long as the Government has the burden of persuading the factfinder that the alibi is *not* credible.

ant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide" *not* (as the dissent would have it) whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of Title VII." *Id.*, at 714–715. At that stage, we said, "[t]he District Court was . . . in a position to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff." *Id.*, at 715 (brackets and internal quotation marks omitted). The *McDonnell Douglas* methodology was " 'never intended to be rigid, mechanized, or ritualistic.' " 460 U. S., at 715 (quoting *Furnco*, 438 U. S., at 577). Rather, once the defendant has responded to the plaintiff's prima facie case, "[t]he district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether the defendant intentionally discriminated against the plaintiff." 460 U. S., at 715 (internal quotation marks omitted). "On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.*, at 715–716. *In confirmation of this* (rather than in contradiction of it), the Court then quotes the problematic passage from *Burdine*, which says that the plaintiff may carry her burden either directly " 'or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " 460 U. S., at 716. It then characterizes that passage as follows: "In short, the district court must decide which party's explanation of the employer's motivation it believes." *Ibid.* It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. It is noteworthy that JUSTICE BLACKMUN, although joining the Court's opinion in *Aikens*, wrote a separate concurrence for the sole purpose of saying that he understood the Court's opinion to be saying what the

dissent today asserts. That concurrence was joined only by Justice Brennan. Justice Marshall would have none of that, but simply refused to join the Court's opinion, concurring without opinion in the judgment. We think there is little doubt what *Aikens* meant.

IV

We turn, finally, to the dire practical consequences that the respondents and the dissent claim our decision today will produce. What appears to trouble the dissent more than anything is that, in its view, our rule is adopted "for the benefit of employers who have been found to have given false evidence in a court of law," whom we "favo[r]" by "exempting them from responsibility for lies." *Post*, at 537. As we shall explain, our rule in no way gives special favor to those employers whose evidence is disbelieved. But initially we must point out that there is no justification for assuming (as the dissent repeatedly does) that those employers whose evidence is disbelieved are perjurers and liars. See *ante*, at 536–537 ("the employer who lies"; "the employer's lie"; "found to have given false evidence"; "lies"); *post*, at 540 ("benefit from lying"; "must lie"; "offering false evidence"), 540, n. 13 ("employer who lies"; "employer caught in a lie"; "rewarded for its falsehoods"), 540 ("requires a party to lie"). Even if these were typically cases in which an individual defendant's sworn assertion regarding a physical occurrence was pitted against an individual plaintiff's sworn assertion regarding the same physical occurrence, surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar. And in these Title VII cases, the defendant is ordinarily *not* an individual but a company, which must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact; and that central fact is *not* a physical occurrence, but rather that employee's state of mind. To say that the company which in good faith

introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.

Undoubtedly some employers (or at least their employees) will be lying. But even if we could readily identify these perjurers, what an extraordinary notion, that we "exempt them from responsibility for their lies" unless we enter Title VII judgments for the plaintiffs! Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that. The dissent's notion of judgment-for-lying is seen to be not even a fair and evenhanded punishment for vice, when one realizes how strangely selective it is: The employer is free to lie to its heart's content about whether the plaintiff ever applied for a job, about how long he worked, how much he made—indeed, about anything and everything *except* the reason for the adverse employment action. And the plaintiff is permitted to lie about absolutely *everything* without losing a verdict he otherwise deserves. This is not a major, or even a sensible, blow against fibbery.

The respondent's argument based upon the employer's supposed lying is a more modest one: "A defendant which unsuccessfully offers a 'phony reason' logically cannot be in a better legal position [*i. e.*, the position of having overcome the presumption from the plaintiff's prima facie case] than a defendant who remains silent, and offers no reasons at all for its conduct." Brief for Respondent 21; see also Brief for United States as *Amicus Curiae* 11, 17–18. But there is no anomaly in that, once one recognizes that the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production. The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all. A defendant who fails to answer a complaint will, on motion, suffer a default judgment that a deceitful response could have avoided. Fed. Rule Civ. Proc. 55(a). A defendant whose answer fails to contest critical

averments in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided. Rule 12(c). And a defendant who fails to submit affidavits creating a genuine issue of fact in response to a motion for summary judgment will suffer a dismissal that false affidavits could have avoided. Rule 56(e). In all of those cases, as under the *McDonnell Douglas* framework, perjury may purchase the defendant a chance at the factfinder—though there, as here, it also carries substantial risks, see Rules 11 and 56(g); 18 U. S. C. § 1621.

The dissent repeatedly raises a procedural objection that is impressive only to one who mistakes the basic nature of the *McDonnell Douglas* procedure. It asserts that "the Court now holds that the further enquiry [*i. e.*, the inquiry that follows the employer's response to the prima facie case] is wide open, not limited at all by the scope of the employer's proffered explanation." *Post*, at 533. The plaintiff cannot be expected to refute "reasons not articulated by the employer, but discerned in the record by the factfinder." *Ante*, at 534. He should not "be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." *Post*, at 534–535. "Under the scheme announced today, any conceivable explanation for the employer's actions that might be suggested by the evidence, however unrelated to the employer's articulated reasons, must be addressed by [the] plaintiff." *Post*, at 537. These statements imply that the employer's "proffered explanation," his "stated reasons," his "articulated reasons," somehow exist *apart from the record*—in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder. ("Your honor, pursuant to *McDonnell Douglas* the defendant hereby formally asserts,

as *its* reason for the dismissal at issue here, incompetence of the employee.") Of course it does not work like that. The reasons the defendant sets forth are set forth "through the introduction of admissible evidence." *Burdine*, 450 U. S., at 255. In other words, the defendant's "articulated reasons" *themselves* are to be found "lurking in the record." It thus makes no sense to contemplate "the employer who is caught in a lie, but succeeds in *injecting* into the trial an *unarticulated* reason for its actions." *Post*, at 540, n. 13 (emphasis added). There is a "lurking-in-the-record" problem, but it exists not for us but for the dissent. *If*, after the employer has met its preliminary burden, the plaintiff need not prove discrimination (and therefore need not disprove *all* other reasons suggested, no matter how vaguely, in the record) there must be some device for determining which particular portions of the record represent "articulated reasons" set forth with sufficient clarity to satisfy *McDonnell Douglas*—since it is only *that* evidence which the plaintiff must refute. But of course our *McDonnell Douglas* framework makes no provision for such a determination, which would have to be made not at the close of the trial but *in medias res*, since otherwise the plaintiff would not know what evidence to offer. It makes no sense.

Respondent contends that "[t]he litigation decision of the employer to place in controversy only . . . particular explanations eliminates from further consideration the alternative explanations that the employer chose not to advance." Brief for Respondent 15. The employer should bear, he contends, "the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons *and therefore prevail.*" *Id.*, at 30 (emphasis added). It is the "therefore" that is problematic. Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment

action by reason of (in the context of the present case) race. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), see, *e. g.*, *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–576 (1985).

Finally, respondent argues that it "would be particularly ill-advised" for us to come forth with the holding we pronounce today "just as Congress has provided a right to jury trials in Title VII" cases. Brief for Respondent 31. See § 102 of the Civil Rights Act of 1991, 105 Stat. 1073, 42 U. S. C. § 1981a(c) (1988 ed., Supp. III) (providing jury trial right in certain Title VII suits). We think quite the opposite is true. Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review.

* * *

We reaffirm today what we said in *Aikens:*

> "[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' *Burdine*, 450 U. S., at 252, in deciding this ultimate question." 460 U. S., at 716.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Twenty years ago, in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), this Court unanimously prescribed a "sensible, orderly way to evaluate the evidence" in a Title VII disparate-treatment case, giving both plaintiff and defendant fair opportunities to litigate "in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978). We have repeatedly reaffirmed and refined the *McDonnell Douglas* framework, most notably in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), another unanimous opinion. See also *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711 (1983); *Furnco*, *supra*. But today, after two decades of stable law in this Court and only relatively recent disruption in some of the Circuits, see *ante*, at 512–513, the Court abandons this practical framework together with its central purpose, which is "to sharpen the inquiry into the elusive factual question of intentional discrimination," *Burdine*, *supra*, at 255, n. 8. Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove. Because the majority departs from settled precedent in substituting a scheme of proof for disparate-treatment actions that promises to be unfair and unworkable, I respectfully dissent.

The *McDonnell Douglas* framework that the Court inexplicably casts aside today was summarized neatly in *Burdine:*

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." 450 U. S., at 252–253 (citations and internal quotation marks omitted).

We adopted this three-step process to implement, in an orderly fashion, "[t]he language of Title VII," which "makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." 411 U. S., at 800. Because "Title VII tolerates no racial discrimination, subtle or otherwise," *id.*, at 801, we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence. See *Aikens, supra,* at 716 ("There will seldom be 'eyewitness' testimony as to the employer's mental processes"). This framework has gained wide acceptance, not only in cases alleging discrimination on the basis of "race, color, religion, sex, or national origin" under Title VII, 42 U. S. C. § 2000e–2, but also in similar cases, such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967. See, *e. g.*, *Halsell* v. *Kimberly-Clark Corp.*, 683 F. 2d 285, 289 (CA8 1982), cert. denied, 459 U. S. 1205 (1983); see also Brief

for Lawyers' Committee for Civil Rights et al. as *Amici Curiae* 3–4.

At the outset, under the *McDonnell Douglas* framework, a plaintiff alleging disparate treatment in the workplace in violation of Title VII must provide the basis for an inference of discrimination. In this case, as all agree, Melvin Hicks met this initial burden by proving by a preponderance of the evidence that he was black and therefore a member of a protected class; he was qualified to be a shift commander; he was demoted and then terminated; and his position remained available and was later filled by a qualified applicant.[1] See 970 F. 2d 487, 491, and n. 7 (CA8 1992). Hicks thus proved what we have called a "prima facie case" of discrimination, and it is important to note that in this context a prima facie case is indeed a proven case. Although, in other contexts, a prima facie case only requires production of enough evidence to raise an issue for the trier of fact, here it means that the plaintiff has actually established the elements of the prima facie case to the satisfaction of the factfinder by a preponderance of the evidence. See *Burdine*, 450 U. S., at 253, 254, n. 7. By doing so, Hicks "eliminat[ed] the most common nondiscriminatory reasons" for demotion and firing: that he was unqualified for the position or that the position was no longer available. *Id.*, at 254. Given our assumption that "people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting," we have explained that a prima facie case implies discrimination "because we presume [the employer's] acts, if otherwise unexplained, are more likely than not based on the consider-

[1] The majority, following the courts below, mentions that Hicks's position was filled by a white male. *Ante*, at 506 (citing the District Court's opinion); see 970 F. 2d 487, 491, n. 7 (CA8 1992). This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today. Cf. *Cumpiano* v. *Banco Santander Puerto Rico*, 902 F. 2d 148, 154–155 (CA1 1990) (identity of replacement is not relevant).

ation of impermissible factors." *Furnco*, 438 U. S., at 577; see also *Burdine*, *supra*, at 254.

Under *McDonnell Douglas* and *Burdine*, however, proof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff. 450 U. S., at 254, n. 7. Although the employer bears no trial burden at all until the plaintiff proves his prima facie case, once the plaintiff does so the employer must either respond or lose. As we made clear in *Burdine*, "[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff." *Id.*, at 254; see *ante*, at 510, n. 3 (in these circumstances, the factfinder "*must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff") (emphasis in original). Thus, if the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, see *ante*, at 513, the plaintiff is entitled to judgment under *Burdine*.

Obviously, it would be unfair to bar an employer from coming forward at this stage with a nondiscriminatory explanation for its actions, since the lack of an open position and the plaintiff's lack of qualifications do not exhaust the set of nondiscriminatory reasons that might explain an adverse personnel decision. If the trier of fact could not consider other explanations, employers' autonomy would be curtailed far beyond what is needed to rectify the discrimination identified by Congress. Cf. *Furnco*, *supra*, at 577–578 (Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees"). On the other hand, it would be equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision. The Court in *McDonnell Douglas* reconciled these competing interests in a very sen-

sible way by requiring the employer to "articulate," through the introduction of admissible evidence, one or more "legitimate, nondiscriminatory reason[s]" for its actions. 411 U. S., at 802; *Burdine*, *supra*, at 254–255. Proof of a prima facie case thus serves as a catalyst obligating the employer to step forward with an explanation for its actions. St. Mary's, in this case, used this opportunity to provide two reasons for its treatment of Hicks: the severity and accumulation of rule infractions he had allegedly committed. 970 F. 2d, at 491.

The Court emphasizes that the employer's obligation at this stage is only a burden of production, *ante*, at 506–507, 509; see 450 U. S., at 254–255, and that, if the employer meets the burden, the presumption entitling the plaintiff to judgment "drops from the case," *id.*, at 255, n. 10; see *ante*, at 507. This much is certainly true,[2] but the obligation also serves an important function neglected by the majority, in requiring the employer "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." 450 U. S., at 255–256. The employer, in other words, has a "burden of production" that gives it the right to choose the scope of the factual issues to be resolved by the factfinder. But investing the employer with this choice has no point unless the scope it chooses binds the employer as well as the plaintiff. Nor does it make sense to tell the employer, as this Court has done, that its explanation of legitimate reasons "must be clear and reasonably specific," if the factfinder can rely on a reason not clearly articulated, or on one not articulated at

[2] The majority contends that it would "fl[y] in the face of our holding in *Burdine*" to "resurrect" this mandatory presumption at a later stage, in cases where the plaintiff proves that the employer's proffered reasons are pretextual. *Ante*, at 510. Hicks does not argue to the contrary. See Brief for Respondent 20, n. 4 (citing Fed. Rule Evid. 301). The question presented in this case is not whether the mandatory presumption is resurrected (everyone agrees that it is not), but whether the factual enquiry is narrowed by the *McDonnell Douglas* framework to the question of pretext.

all, to rule in favor of the employer.[3] *Id.*, at 258; see *id.*, at 255, n. 9 ("An articulation not admitted into evidence will not suffice").

Once the employer chooses the battleground in this manner, "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255. During this final, more specific enquiry, the employer has no burden to prove that its proffered reasons are true; rather, the plaintiff must prove by a preponderance of the evidence that the proffered reasons are pretextual.[4] *Id.*, at 256. *McDonnell Douglas* makes it clear that if the plaintiff fails to show "pretext," the challenged employment action "must stand." 411 U. S., at 807. If, on the other hand, the plaintiff carries his burden of showing "pretext," the court "must order a prompt and appropriate remedy."[5] *Ibid.* Or, as we said in *Burdine:* "[The plaintiff]

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[3] The majority is simply wrong when it suggests that my reading of *McDonnell Douglas* and *Burdine* proceeds on the assumption that the employer's reasons must be stated "apart from the record." *Ante*, at 522 (emphasis omitted). As I mentioned above, and I repeat here, such reasons must be set forth "through the introduction of admissible evidence." *Supra*, at 529; see *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 255 (1981). Such reasons cannot simply be found "lurking in the record," as the Court suggests, *ante*, at 523, for *Burdine* requires the employer to articulate its reasons through testimony or other admissible evidence that is "clear and reasonably specific," 450 U. S., at 258. Accordingly, the plaintiff need not worry about waiting for the court to identify the employer's reasons at the end of trial, or in this case six months after trial, because *McDonnell Douglas* and *Burdine* require the employer to articulate its reasons clearly during trial. No one, for example, had any trouble in this case identifying the two reasons for Hicks's dismissal that St. Mary's articulated during trial.

[4] We clarified this aspect of the *McDonnell Douglas* framework in *Burdine*, where the question presented was "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U. S., at 250.

[5] The Court makes a halfhearted attempt to rewrite these passages from *McDonnell Douglas*, arguing that "pretext for discrimination" should appear where "pretext" actually does. *Ante*, at 516, and n. 6. I seriously

now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination."[6] 450 U. S., at 256. *Burdine* drives home the point that the case has proceeded to "a new level of specificity" by explaining that the plaintiff can meet his burden of persuasion in either of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[7] *Ibid.*; see *Aikens*, 460 U. S., at 716

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doubt that such a change in diction would have altered the meaning of these crucial passages in the manner the majority suggests, see n. 7, *infra*, but even on the majority's assumption that there is a crucial difference, it must believe that the *McDonnell Douglas* Court was rather sloppy in summarizing its own opinion. Earlier in the *McDonnell Douglas* opinion, the Court does state that an employer may not use a plaintiff's conduct "as a pretext for . . . discrimination." 411 U. S., at 804; see *ante*, at 516, n. 6 (quoting this sentence to justify rewriting the *McDonnell Douglas* summary). But in the next sentence, when the *McDonnell Douglas* Court's focus shifts from what the employer may not do to what the plaintiff must show, the Court states that the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext," plain and simple. 411 U. S., at 804. To the extent choosing between "pretext" and "pretext for discrimination" is important, the *McDonnell Douglas* Court's diction appears to be consistent, not sloppy. *Burdine*, of course, nails down the point that the plaintiff satisfies his burden simply by proving that the employer's explanation does not deserve credence. See *infra* this page.

[6] The majority puts forward what it calls "a more reasonable reading" of this passage, *ante*, at 517, but its chosen interpretation of the "merger" that occurs is flatly contradicted by the very next sentence in *Burdine*, which indicates, as the majority subsequently admits, *ante*, at 517, that the burden of persuasion is limited to the question of pretext. It seems to me "more reasonable" to interpret the "merger" language in harmony with, rather than in contradiction to, its immediate context in *Burdine*.

[7] The majority's effort to rewrite *Burdine* centers on repudiating this passage, see *ante*, at 517–520, which has provided specific, concrete guidance to courts and Title VII litigants for more than a decade, and on replacing "pretext" wherever it appears with "pretext for discrimination,"

(quoting this language from *Burdine*); 460 U. S., at 717–718 (BLACKMUN, J., joined by Brennan, J., concurring); see also *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 287–289 (1989) (KENNEDY, J., dissenting) (discussing these "two alternative methods" and relying on JUSTICE BLACKMUN's concurrence in *Aikens*). That the plaintiff can succeed simply by showing that "the employer's proffered explanation is unworthy of credence" indicates that the case has been narrowed to the question whether the employer's proffered reasons are pretextual.[8] Thus, because Hicks carried his burden of persuasion by showing that St. Mary's proffered reasons were

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as defined by the majority, see *ante*, at 515–516. These two efforts are intertwined, for *Burdine* tells us specifically how a plaintiff can prove either "pretext" or "pretext for discrimination": "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256 (emphasis added). The majority's chosen method of proving "pretext for discrimination" changes *Burdine*'s "either . . . or" into a "both . . . and": "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Ante*, at 515 (emphasis deleted). The majority thus takes a shorthand phrase from *Burdine* ("pretext for discrimination"), discovers requirements in the phrase that are directly at odds with the specific requirements actually set out in *Burdine*, and then rewrites *Burdine* in light of this "discovery." No one "[f]amiliar with our case law," *ante*, at 512, will be persuaded by this strategy.

[8] That the sole, and therefore determinative, issue left at this stage is pretext is further indicated by our discussion in *McDonnell Douglas* of the various types of evidence "that may be relevant to any showing of pretext," 411 U. S., at 804, by our decision to reverse in *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567 (1978), because the Court of Appeals "did not conclude that the [challenged] practices were a pretext for discrimination," *id.*, at 578, and by our reminder in *Burdine* that even after the employer meets the plaintiff's prima facie case, the "evidence previously introduced by the plaintiff to establish a prima facie case" and the "inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the [employer's] explanation is pretextual," 450 U. S., at 255, n. 10.

"unworthy of credence," the Court of Appeals properly concluded that he was entitled to judgment.[9] 970 F. 2d, at 492.

The Court today decides to abandon the settled law that sets out this structure for trying disparate-treatment Title VII cases, only to adopt a scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court. Under the majority's scheme, once the employer succeeds in meeting its burden of production, "the *McDonnell Douglas* framework . . . is no longer relevant." *Ante*, at 510. Whereas we said in *Burdine* that if the employer carries its burden of production, "the factual inquiry proceeds to a new level of specificity," 450 U. S., at 255, the Court now holds that the further enquiry is wide open, not limited at all by the scope of the employer's proffered explanation.[10] Despite the Court's assiduous effort to reinterpret our precedents, it remains clear that today's decision stems from a flat misreading of *Burdine* and ignores the central purpose of the *McDonnell Douglas* framework, which is "progressively to sharpen the inquiry

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[9] The foregoing analysis of burdens describes who wins on various combinations of evidence and proof. It may or may not also describe the actual sequence of events at trial. In a bench trial, for example, the parties may be limited in their presentation of evidence until the court has decided whether the plaintiff has made his prima facie showing. But the court also may allow in all the evidence at once. In such a situation, under our decision in *Aikens*, the defendant will have to choose whether it wishes simply to attack the prima facie case or whether it wants to present nondiscriminatory reasons for its actions. If the defendant chooses the former approach, the factfinder will decide at the end of the trial whether the plaintiff has proven his prima facie case. If the defendant takes the latter approach, the only question for the factfinder will be the issue of pretext. *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983); see *ante*, at 510, n. 3.

[10] Under the Court's unlikely interpretation of the "new level of specificity" called for by *Burdine* (and repeated in *Aikens*, see 460 U. S., at 715), the issues facing the plaintiff and the court can be discovered anywhere in the evidence the parties have introduced concerning discriminatory motivation. *Ante*, at 516.

into the elusive factual question of intentional discrimination." 450 U. S., at 255, n. 8. We have repeatedly identified the compelling reason for limiting the factual issues in the final stage of a *McDonnell Douglas* case as "the requirement that the plaintiff be afforded a full and fair opportunity to demonstrate pretext." 450 U. S., at 258 (internal quotation marks omitted); see *id.*, at 256 (the plaintiff "must have the opportunity to demonstrate" pretext); *Aikens, supra*, at 716, n. 5; *Furnco*, 438 U. S., at 578; *McDonnell Douglas*, 411 U. S., at 805. The majority fails to explain how the plaintiff, under its scheme, will ever have a "full and fair opportunity" to demonstrate that reasons not articulated by the employer, but discerned in the record by the factfinder, are also unworthy of credence. The Court thus transforms the employer's burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual.

The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent. The Court repeats the truism that the plaintiff has the "ultimate burden" of proving discrimination, see *ante*, at 507, 508, 511, 518, without ever facing the practical question of how the plaintiff without such direct evidence can meet this burden. *Burdine* provides the answer, telling us that such a plaintiff may succeed in meeting his ultimate burden of proving discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256; see *Aikens*, 460 U. S., at 716; *id.*, at 717–718 (BLACKMUN, J., joined by Brennan, J., concurring). The possibility of some practical procedure for addressing what *Burdine* calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive. And yet, under the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not

the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record. In the Court's own words, the plaintiff must "disprove *all* other reasons suggested, no matter how vaguely, in the record." *Ante*, at 523 (emphasis in original).

While the Court appears to acknowledge that a plaintiff will have the task of disproving even vaguely suggested reasons, and while it recognizes the need for "[c]larity regarding the requisite elements of proof," *ante*, at 524, it nonetheless gives conflicting signals about the scope of its holding in this case. In one passage, the Court states that although proof of the falsity of the employer's proffered reasons does not "compe[l] judgment for the plaintiff," such evidence, without more, "will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Ante*, at 511 (emphasis deleted). The same view is implicit in the Court's decision to remand this case, *ante*, at 524–525, keeping Hicks's chance of winning a judgment alive although he has done no more (in addition to proving his prima facie case) than show that the reasons proffered by St. Mary's are unworthy of credence. But other language in the Court's opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." *Ante*, at 515; see *ante*, at 507–508. In addition, in summing up its reading of our earlier cases, the Court states that "[i]t is not enough . . . to disbelieve the employer." *Ante*, at 519 (emphasis deleted). This "pretext-plus" approach would turn *Burdine* on its head, see n. 7, *supra*, and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's

articulated reasons are unworthy of credence. Cf. *Carter* v. *Duncan-Huggins, Ltd.*, 234 U. S. App. D. C. 126, 146, 727 F. 2d 1225, 1245 (1984) (Scalia, J., dissenting) ("[I]n order to get to the jury the plaintiff would . . . have to introduce some evidence . . . that the *basis* for [the] discriminatory treatment was *race*") (emphasis in original). See generally Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L. J. 57 (1991) (criticizing the "pretext-plus" approach).

The Court fails to explain, moreover, under either interpretation of its holding, why proof that the employer's articulated reasons are "unpersuasive, or even obviously contrived," *ante*, at 524, falls short. Under *McDonnell Douglas* and *Burdine*, there would be no reason in this situation to question discriminatory intent. The plaintiff has raised an inference of discrimination (though no longer a presumption) through proof of his prima facie case, and as we noted in *Burdine*, this circumstantial proof of discrimination can also be used by the plaintiff to show pretext. 450 U. S., at 255, n. 10. Such proof is merely strengthened by showing, through use of further evidence, that the employer's articulated reasons are false, since "common experience" tells us that it is "more likely than not" that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff. *Furnco*, 438 U. S., at 577. Unless *McDonnell Douglas*'s command to structure and limit the case as the employer chooses is to be rendered meaningless, we should not look beyond the employer's lie by assuming the possible existence of other reasons the employer might have proffered without lying. By telling the factfinder to keep digging in cases where the plaintiff's proof of pretext turns on showing the employer's reasons to be unworthy of credence, the majority rejects the very point of the *McDonnell Douglas* rule requiring the scope of the factual enquiry to be lim-

ited, albeit in a manner chosen by the employer. What is more, the Court is throwing out the rule for the benefit of employers who have been found to have given false evidence in a court of law. There is simply no justification for favoring these employers by exempting them from responsibility for lies.[11] It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding in it a justification to dispense with an orderly procedure for getting at "the elusive factual question of intentional discrimination." *Burdine*, 450 U. S., at 255, n. 8.

With no justification in the employer's favor, the consequences to actual and potential Title VII litigants stand out sharply. To the extent that workers like Melvin Hicks decide not to sue, given the uncertainties they would face under the majority's scheme, the legislative purpose in adopting Title VII will be frustrated. To the extent such workers nevertheless decide to press forward, the result will likely be wasted time, effort, and money for all concerned. Under the scheme announced today, any conceivable explanation for the employer's actions that might be suggested by the evidence, however unrelated to the employer's articulated reasons, must be addressed by a plaintiff who does not

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[11] Although the majority chides me for referring to employers who offer false evidence in court as "liars," see *ante*, at 520, it was the first to place such employers in the company of perjurers, see *ante*, at 522. In any event, it is hardly "absurd" to say that an individual is lying when the factfinder does not believe his testimony, whether he is testifying on his own behalf or as the agent of a corporation. *Ante*, at 520–521. Factfinders constantly must decide whether explanations offered in court are true, and when they conclude, by a preponderance of the evidence, that a proffered explanation is false, it is not unfair to call that explanation a lie. To label it "perjury," a criminal concept, would be jumping the gun, but only the majority has employed that term. See *ante*, at 520–522.

wish to risk losing. Since the Court does not say whether a trial court may limit the introduction of evidence at trial to what is relevant to the employer's articulated reasons, and since the employer can win on the possibility of an unstated reason, the scope of admissible evidence at trial presumably includes any evidence potentially relevant to "the ultimate question" of discrimination, unlimited by the employer's stated reasons. *Ante,* at 511. If so, Title VII trials promise to be tedious affairs. But even if, on the contrary, relevant evidence is still somehow to be limited by reference to the employer's reasons, however "vaguely" articulated, the careful plaintiff will have to anticipate all the side issues that might arise even in a more limited evidentiary presentation. Thus, in either case, pretrial discovery will become more extensive and wide ranging (if the plaintiff can afford it), for a much wider set of facts could prove to be both relevant and important at trial. The majority's scheme, therefore, will promote longer trials and more pretrial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary.

In addition to its unfairness and impracticality, the Court's new scheme, on its own terms, produces some remarkable results. Contrary to the assumption underlying the *McDonnell Douglas* framework, that employers will have "*some* reason" for their hiring and firing decisions, see *Furnco, supra,* at 577 (emphasis in original), the majority assumes that some employers will be unable to discover the reasons for their own personnel actions. See *ante,* at 513. Under the majority's scheme, however, such employers, when faced with proof of a prima facie case of discrimination, still must carry the burden of producing evidence that a challenged employment action was taken for a nondiscriminatory reason. *Ante,* at 506–507, 509. Thus, if an employer claims it cannot produce any evidence of a nondiscriminatory reason

for a personnel decision,[12] and the trier of fact concludes that the plaintiff has proven his prima facie case, the court must enter judgment for the plaintiff. *Ante*, at 510, n. 3. The majority's scheme therefore leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will

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[12] The Court is unrealistically concerned about the rare case in which an employer cannot easily turn to one of its employees for an explanation of a personnel decision. See *ante*, at 513. Most companies, of course, keep personnel records, and such records generally are admissible under Rule 803(6) of the Federal Rules of Evidence. See, *e. g.*, *Martin* v. *Funtime, Inc.*, 963 F. 2d 110, 115–116 (CA6 1992); *EEOC* v. *Alton Packaging Corp.*, 901 F. 2d 920, 925–926 (CA11 1990). Even those employers who do not keep records of their decisions will have other means of discovering the likely reasons for a personnel action by, for example, interviewing co-workers, examining employment records, and identifying standard personnel policies. The majority's scheme rewards employers who decide, in this atypical situation, to invent rather than to investigate.

This concern drives the majority to point to the hypothetical case, *ante*, at 513–514, of the employer with a disproportionately high percentage of minority workers who would nonetheless lose a Title VII racial discrimination case by giving an untrue reason for a challenged personnel action. What the majority does not tell us, however, is why such an employer must rely solely on an "antagonistic former employee," *ante*, at 514, rather than on its own personnel records, among other things, to establish the credible, nondiscriminatory reason it almost certainly must have had, given the facts assumed. The majority claims it would be a "mockery of justice" to allow recovery against an employer who presents "compelling evidence" of nondiscrimination simply because the jury believes a reason given in a personnel record "is probably not the 'true' one." *Ante*, at 514, n. 5. But prior to drawing such a conclusion, the jury would consider all of the "compelling evidence" as at least circumstantial evidence for the truth of the nondiscriminatory explanation, because the employer would be able to argue that it would not lie to avoid a discrimination charge when its general behavior had been so demonstrably meritorious. If the jury still found that the plaintiff had carried his burden to show untruth, the untruth must have been a real whopper, or else the "compelling evidence" must not have been very compelling. In either event, justice need not worry too much about mockery.

benefit from lying,[13] but must lie, to defend successfully against a disparate-treatment action. By offering false evidence of a nondiscriminatory reason, such an employer can rebut the presumption raised by the plaintiff's prima facie case, and then hope that the factfinder will conclude that the employer may have acted for a reason unknown rather than for a discriminatory reason. I know of no other scheme for structuring a legal action that, on its own terms, requires a party to lie in order to prevail.

Finally, the Court's opinion destroys a framework carefully crafted in precedents as old as 20 years, which the Court attempts to deflect, but not to confront. The majority first contends that the opinions creating and refining the *McDonnell Douglas* framework consist primarily of dicta, whose bearing on the issue we consider today presumably can be ignored. See *ante*, at 515. But this readiness to disclaim the Court's considered pronouncements devalues them. Cases, such as *McDonnell Douglas*, that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta. Courts and litigants rely on this Court to structure lawsuits based on federal statutes in an orderly and sensible manner, and we should not casually abandon the structures adopted.

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[13] As the majority readily admits, its scheme places any employer who lies in a better position than the employer who says nothing. *Ante*, at 521–522. Under *McDonnell Douglas* and *Burdine*, an employer caught in a lie will lose on the merits, subjecting himself to liability not only for damages, but also for the prevailing plaintiff's attorney's fees, including, presumably, fees for the extra time spent to show pretext. See 42 U. S. C. § 2000e–5(k) (1988 ed., Supp. III) (providing for an award of a "reasonable attorney's fee" to the "prevailing party" in a Title VII action). Under the majority's scheme, the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions, will win its case and walk away rewarded for its falsehoods.

Because the Court thus naturally declines to rely entirely on dismissing our prior directives as dicta, it turns to the task of interpreting our prior cases in this area, in particular *Burdine*. While acknowledging that statements from these earlier cases may be read, and in one instance must be read, to limit the final enquiry in a disparate-treatment case to the question of pretext, the Court declares my reading of those cases to be "utter[ly] implausib[le]," *ante*, at 513, imputing views to earlier Courts that would be "beneath contempt," *ante*, at 518, n. 7. The unlikely reading is, however, shared by the Solicitor General and the Equal Employment Opportunity Commission, which is charged with implementing and enforcing Title VII and related statutes, see Brief for United States et al. as *Amici Curiae* 1–2, not to mention the Court of Appeals in this case and, even by the Court's count, more than half of the Courts of Appeals to have discussed the question (some, albeit, in dicta). See *ante*, at 512–513. The company should not be cause for surprise. For reasons explained above, *McDonnell Douglas* and *Burdine* provide a clear answer to the question before us, and it would behoove the majority to explain its decision to depart from those cases.

The Court's final attempt to neutralize the force of our precedents comes in its claim that *Aikens* settled the question presented today. This attempt to rest on *Aikens* runs into the immediate difficulty, however, that *Aikens* repeats what we said earlier in *Burdine:* the plaintiff may succeed in meeting his ultimate burden of persuasion "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Aikens*, 460 U. S., at 716 (quoting *Burdine*, 450 U. S., at 256). Although the *Aikens* Court quoted this statement approvingly, the majority here projects its view that the latter part of the statement is "problematic," *ante*, at 519, arguing that the next sentence in *Aikens* takes care of

the "problem." The next sentence, however, only creates more problems for the majority, as it directs the District Court to "decide *which party's* explanation of the employer's motivation it believes." 460 U. S., at 716 (emphasis supplied). By requiring the factfinder to choose between the employer's explanation and the plaintiff's claim of discrimination (shown either directly or indirectly), *Aikens* flatly bars the Court's conclusion here that the factfinder can choose a third explanation, never offered by the employer, in ruling against the plaintiff. Because *Aikens* will not bear the reading the majority seeks to place upon it, there is no hope of projecting into the past the abandonment of precedent that occurs today.

I cannot join the majority in turning our back on these earlier decisions. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. See Civil Rights Act of 1991, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonnell Douglas* and *Burdine*.

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The enhancement of a Title VII plaintiff's burden wrought by the Court's opinion is exemplified in this case. Melvin Hicks was denied any opportunity, much less a full and fair one, to demonstrate that the supposedly nondiscriminatory explanation for his demotion and termination, the personal animosity of his immediate supervisor, was unworthy of credence. In fact, the District Court did not find that personal animosity (which it failed to recognize might be racially moti-

vated) was the true reason for the actions St. Mary's took; it adduced this reason simply as a possibility in explaining that Hicks had failed to prove "that the crusade [to terminate him] was racially rather than personally motivated." 756 F. Supp. 1244, 1252 (ED Mo. 1991). It is hardly surprising that Hicks failed to prove anything about this supposed personal crusade, since St. Mary's never articulated such an explanation for Hicks's discharge, and since the person who allegedly conducted this crusade denied at trial any personal difficulties between himself and Hicks. App. 46. While the majority may well be troubled about the unfair treatment of Hicks in this instance and thus remands for review of whether the District Court's factual conclusions were clearly erroneous, see *ante*, at 524–525, the majority provides Hicks with no opportunity to produce evidence showing that the District Court's hypothesized explanation, first articulated six months after trial, is unworthy of credence. Whether Melvin Hicks wins or loses on remand, many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ.

Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent.

Syllabus

ALEXANDER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-1526. Argued January 12, 1993—Decided June 28, 1993

After a full criminal trial, petitioner, the owner of numerous businesses dealing in sexually explicit materials, was convicted of, *inter alia*, violating federal obscenity laws and the Racketeer Influenced and Corrupt Organizations Act (RICO). The obscenity convictions, based on a finding that seven items sold at several stores were obscene, were the predicates for his RICO convictions. In addition to imposing a prison term and fine, the District Court ordered petitioner, as punishment for the RICO violations, to forfeit his businesses and almost $9 million acquired through racketeering activity. In affirming the forfeiture order, the Court of Appeals rejected petitioner's arguments that RICO's forfeiture provisions constitute a prior restraint on speech and are overbroad. The court also held that the forfeiture did not violate the Eighth Amendment, concluding that proportionality review is not required of any sentence less than life imprisonment without the possibility of parole. It did not consider whether the forfeiture was disproportionate or "excessive."

Held:

1. RICO's forfeiture provisions, as applied here, did not violate the First Amendment. Pp. 549-558.

(a) The forfeiture here is a permissible criminal punishment, not a prior restraint on speech. The distinction between prior restraints and subsequent punishments is solidly grounded in this Court's cases. The term "prior restraint" describes orders *forbidding* certain communications that are issued before the communications occur. See, *e. g.*, *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697. However, the order here imposes no legal impediment to petitioner's ability to engage in any expressive activity; it just prevents him from financing those activities with assets derived from his prior racketeering offenses. RICO is oblivious to the expressive or nonexpressive nature of the assets forfeited. Petitioner's assets were forfeited because they were directly related to past racketeering violations, and thus they differ from material seized or restrained on suspicion of being obscene without a prior judicial obscenity determination, as occurred in, *e. g.*, *Marcus* v. *Search Warrant of Kansas City, Mo., Property*, 367 U. S. 717. Nor were his assets ordered forfeited without the requisite procedural safeguards.

Syllabus

Fort Wayne Books, Inc. v. *Indiana*, 489 U. S. 46, distinguished. His claim is also inconsistent with *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697, in which the Court rejected a claim that the closure of an adult bookstore under a general nuisance statute was an improper prior restraint. His definition of prior restraint also would undermine the time-honored distinction between barring future speech and penalizing past speech. Pp. 549–554.

(b) Since the RICO statute does not criminalize constitutionally protected speech, it is materially different from the statutes at issue in this Court's overbreadth cases. Cf., *e. g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574–575. In addition, the threat of forfeiture has no more of a "chilling" effect on free expression than threats of a prison term or large fine, which are constitutional under *Fort Wayne Books*. Nor can the forfeiture be said to offend the First Amendment based on *Arcara*'s analysis that criminal sanctions with some incidental effect on First Amendment activities are subject to First Amendment scrutiny where it was the expressive conduct that drew the legal remedy, 478 U. S., at 706–707. While the conduct drawing the legal remedy here may have been expressive, "obscenity" can be regulated or actually proscribed consistent with the Amendment, see, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 485. Pp. 554–558.

2. The case is remanded for the Court of Appeals to consider petitioner's claim that the forfeiture, considered atop his prison term and fine, is "excessive" within the meaning of the Excessive Fines Clause of the Eighth Amendment. The Court of Appeals rejected petitioner's Eighth Amendment challenge with a statement that applies only to the Amendment's prohibition against "cruel and unusual punishments." The Excessive Fines Clause limits the Government's power to extract payments as punishment for an offense, and the *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine." The question whether the forfeiture was excessive must be considered in light of the extensive criminal activities that petitioner apparently conducted through his enormous racketeering enterprise over a substantial period of time rather than the number of materials actually found to be obscene. Pp. 558–559.

943 F. 2d 825, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and THOMAS, JJ., joined. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 559. KENNEDY, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, and in Part II of which SOUTER, J., joined, *post*, p. 560.

John H. Weston argued the cause for petitioner. With him on the briefs was *G. Randall Garrou.*

Solicitor General Starr argued the cause for the United States. With him on the brief were *Assistant Attorney General Mueller, Deputy Solicitor General Bryson,* and *Paul J. Larkin, Jr.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

After a full criminal trial, petitioner Ferris J. Alexander, owner of more than a dozen stores and theaters dealing in sexually explicit materials, was convicted on, *inter alia,* 17 obscenity counts and 3 counts of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). The obscenity convictions, based on the jury's findings that four magazines and three videotapes sold at several of petitioner's stores were obscene, served as the predicates for his three RICO convictions. In addition to imposing a prison term and fine, the District Court ordered petitioner to forfeit, pursuant to 18 U. S. C. § 1963 (1988 ed. and Supp. III), certain assets that were directly related to his racketeering activity as punishment for his RICO violations. Petitioner argues that this forfeiture violated the First and Eighth Amendments to the Constitution. We reject petitioner's

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*Briefs of *amici curiae* urging reversal were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger;* for the American Civil Liberties Union et al. by *Marvin E. Frankel, Steven R. Shapiro,* and *Marjorie Heins;* for the American Library Association et al. by *Bruce J. Ennis, Jr.,* and *David W. Ogden;* for Feminists for Free Expression by *Helen M. Mickiewicz;* and for the Video Software Dealers Association by *Charles B. Ruttenberg, James P. Mercurio,* and *Theodore D. Frank.*

Briefs of *amici curiae* urging affirmance were filed for Christian Legal Defense by *Wendell R. Bird* and *David J. Myers;* for the National Family Legal Foundation et al. by *James P. Mueller* and *Len L. Munsil;* for Morality in Media, Inc., by *Paul J. McGeady;* and for the Religious Alliance Against Pornography et al. by *H. Robert Showers.*

claims under the First Amendment but remand for reconsideration of his Eighth Amendment challenge.

Petitioner was in the so-called "adult entertainment" business for more than 30 years, selling pornographic magazines and sexual paraphernalia, showing sexually explicit movies, and eventually selling and renting videotapes of a similar nature. He received shipments of these materials at a warehouse in Minneapolis, Minnesota, where they were wrapped in plastic, priced, and boxed. He then sold his products through some 13 retail stores in several different Minnesota cities, generating millions of dollars in annual revenues. In 1989, federal authorities filed a 41-count indictment against petitioner and others, alleging, *inter alia*, operation of a racketeering enterprise in violation of RICO. The indictment charged 34 obscenity counts and 3 RICO counts, the racketeering counts being predicated on the obscenity charges. The indictment also charged numerous counts of tax evasion and related offenses that are not relevant to the questions before us.

Following a 4-month jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of 17 substantive obscenity offenses: 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U. S. C. § 1465; and 5 counts of engaging in the business of selling obscene material, in violation of 18 U. S. C. § 1466 (1988 ed. and Supp. III). He also was convicted of 3 RICO offenses that were predicated on the obscenity convictions: one count of receiving and using income derived from a pattern of racketeering activity, in violation of 18 U. S. C. § 1962(a); one count of conducting a RICO enterprise, in violation of § 1962(c); and one count of conspiring to conduct a RICO enterprise, in violation of § 1962(d). As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene. Multiple copies of these magazines and videos, which graphically de-

picted a variety of "hard core" sexual acts, were distributed throughout petitioner's adult entertainment empire.

Petitioner was sentenced to a total of six years in prison, fined $100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release. In addition to these punishments, the District Court reconvened the same jury and conducted a forfeiture proceeding pursuant to § 1963(a)(2). At this proceeding, the Government sought forfeiture of the businesses and real estate that represented petitioner's interest in the racketeering enterprise, § 1963(a)(2)(A), the property that afforded petitioner influence over that enterprise, § 1963(a)(2)(D), and the assets and proceeds petitioner had obtained from his racketeering offenses, §§ 1963(a)(1), (3). The jury found that petitioner had an interest in 10 pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct his racketeering enterprise. Sitting without the jury, the District Court then found that petitioner had acquired a variety of assets as a result of his racketeering activities. The court ultimately ordered petitioner to forfeit his wholesale and retail businesses (including all the assets of those businesses) and almost $9 million in moneys acquired through racketeering activity.[1]

The Court of Appeals affirmed the District Court's forfeiture order. *Alexander* v. *Thornburgh*, 943 F. 2d 825 (CA8 1991). It rejected petitioner's argument that the application of RICO's forfeiture provisions constituted a prior restraint on speech and hence violated the First Amendment. Recognizing the well-established distinction between prior restraints and subsequent criminal punishments, the Court of Appeals found that the forfeiture here was "a criminal

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[1] Not wishing to go into the business of selling pornographic materials—regardless of whether they were legally obscene—the Government decided that it would be better to destroy the forfeited expressive materials than sell them to members of the public. See Brief for United States 26–27, n. 11.

penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities," and not a prior restraint on speech. *Id.*, at 834. The court also rejected petitioner's claim that RICO's forfeiture provisions are constitutionally overbroad, pointing out that the forfeiture order was properly limited to assets linked to petitioner's past racketeering offenses. *Id.*, at 835. Lastly, the Court of Appeals concluded that the forfeiture order does not violate the Eighth Amendment's prohibition against "cruel and unusual punishments" and "excessive fines." In so ruling, however, the court did not consider whether the forfeiture in this case was grossly disproportionate or excessive, believing that the Eighth Amendment "'does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole.'" *Id.*, at 836 (quoting *United States* v. *Pryba*, 900 F. 2d 748, 757 (CA4), cert. denied, 498 U. S. 924 (1990)). We granted certiorari, 505 U. S. 1217 (1992).

Petitioner first contends that the forfeiture in this case, which effectively shut down his adult entertainment business, constituted an unconstitutional prior restraint on speech, rather than a permissible criminal punishment. According to petitioner, forfeiture of expressive materials and the assets of businesses engaged in expressive activity, when predicated solely upon previous obscenity violations, operates as a prior restraint because it prohibits future presumptively protected expression in retaliation for prior unprotected speech. Practically speaking, petitioner argues, the effect of the RICO forfeiture order here was no different from the injunction prohibiting the publication of expressive material found to be a prior restraint in *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). As petitioner puts it, see Brief for Petitioner 25, the forfeiture order imposed a complete *ban* on his future expression because of previous unprotected speech. We disagree. By lumping the forfeiture imposed in this case after a full criminal trial with an injunction enjoining future speech, petitioner stretches the term "prior

restraint" well beyond the limits established by our cases. To accept petitioner's argument would virtually obliterate the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments.

The term "prior restraint" is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984) (emphasis added). Temporary restraining orders and permanent injunctions—*i. e.*, court orders that actually forbid speech activities—are classic examples of prior restraints. See *id.*, § 4.03, at 4–16. This understanding of what constitutes a prior restraint is borne out by our cases, even those on which petitioner relies. In *Near* v. *Minnesota ex rel. Olson*, *supra*, we invalidated a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from producing any future "malicious, scandalous or defamatory" publication. *Id.*, at 706. *Near*, therefore, involved a true restraint on future speech—a permanent injunction. So, too, did *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), and *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980) *(per curiam)*, two other cases cited by petitioner. In *Keefe*, we vacated an order "*enjoining* petitioners from distributing leaflets anywhere in the town of Westchester, Illinois." 402 U. S., at 415 (emphasis added). And in *Vance*, we struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be obscene. 445 U. S., at 311. See also *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) *(per curiam)* (Government sought to enjoin publication of the Pentagon Papers).

By contrast, the RICO forfeiture order in this case does not *forbid* petitioner to engage in any expressive activi-

ties in the future, nor does it require him to obtain prior approval for any expressive activities. It only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores, restock his inventory, and hire staff, petitioner can go back into the adult entertainment business tomorrow, and sell as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order. Unlike the injunctions in *Near*, *Keefe*, and *Vance*, the forfeiture order in this case imposes no legal impediment to—no prior restraint on—petitioner's ability to engage in any expressive activity he chooses. He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses.

The constitutional infirmity in nearly all of our prior restraint cases involving obscene material, including those on which petitioner and the dissent rely, see *post*, at 570–571, 577, was that the government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so. See, *e. g.*, *Marcus* v. *Search Warrant of Kansas City, Mo., Property*, 367 U. S. 717 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205 (1964); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); *Vance*, *supra*. In this case, however, the assets in question were ordered forfeited not because they were believed to be obscene, but because they were directly related to petitioner's past racketeering violations. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO.

Indeed, a contrary scheme would be disastrous from a policy standpoint, enabling racketeers to evade forfeiture by investing the proceeds of their crimes in businesses engaging in expressive activity.

Nor were the assets in question ordered forfeited without according petitioner the requisite procedural safeguards, another recurring theme in our prior restraint cases. Contrasting this case with *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46 (1989), aptly illustrates this point. In *Fort Wayne Books*, we rejected on constitutional grounds the pretrial seizure of certain expressive material that was based upon a finding of "no more than *probable cause to believe* that a RICO violation had occurred." *Id.*, at 66 (emphasis in original). In so holding, we emphasized that there had been no prior judicial "determination that the seized items were 'obscene' or that a RICO violation *ha[d] occurred.*" *Ibid.* (emphasis in original). "[M]ere probable cause to believe a legal violation ha[d] transpired," we said, "is not adequate to remove books or films from circulation." *Ibid.* Here, by contrast, the seizure was not premature, because the Government established beyond a reasonable doubt the basis for the forfeiture. Petitioner had a full criminal trial on the merits of the obscenity and RICO charges during which the Government proved that four magazines and three videotapes were obscene and that the other forfeited assets were directly linked to petitioner's commission of racketeering offenses.

Petitioner's claim that the RICO forfeiture statute operated as an unconstitutional prior restraint in this case is also inconsistent with our decision in *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986). In that case, we sustained a court order, issued under a general nuisance statute, that closed down an adult bookstore that was being used as a place of prostitution and lewdness. In rejecting out-of-hand a claim that the closure order amounted to an improper prior restraint on speech, we stated:

> "The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.*, at 705–706, n. 2.

This reasoning applies with equal force to this case, and thus confirms that the RICO forfeiture order was not a prior restraint on speech, but a punishment for past criminal conduct. Petitioner attempts to distinguish *Arcara* on the ground that obscenity, unlike prostitution or lewdness, has "'a significant expressive element.'" Brief for Petitioner 16 (quoting *Arcara*, *supra*, at 706). But that distinction has no bearing on the question whether the forfeiture order in this case was an impermissible prior restraint.

Finally, petitioner's proposed definition of the term "prior restraint" would undermine the time-honored distinction between barring speech in the future and penalizing past speech. The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, but punishment after publication was. This very limited application of the principle of freedom of speech was held inconsistent with our First Amendment as long ago as *Grosjean* v. *American Press Co.*, 297 U. S. 233, 246 (1936). While we may have given a broader definition to the term "prior restraint" than was given to it in English common law,[2] our decisions have steadfastly preserved the

[2] The doctrine of prior restraint has its roots in the 16th- and 17th-century English system of censorship. Under that system, all printing presses and printers were licensed by the government, and nothing could lawfully be published without the prior approval of a government or

distinction between prior restraints and subsequent punishments. Though petitioner tries to dismiss this distinction as "neither meaningful nor useful," Brief for Petitioner 29, we think it is critical to our First Amendment jurisprudence. Because we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975), it is important for us to delineate with some precision the defining characteristics of a prior restraint. To hold that the forfeiture order in this case constituted a prior restraint would have the exact opposite effect: It would blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not.

In sum, we think that fidelity to our cases requires us to analyze the forfeiture here not as a prior restraint, but under normal First Amendment standards. So analyzing it, we find that petitioner's claim falls well short of the mark. He does not challenge either his 6-year jail sentence or his $100,000 fine as violative of the First Amendment. The first inquiry that comes to mind, then, is why, if incarceration for six years and a fine of $100,000 are permissible forms of punishment under the RICO statute, the challenged forfeiture of certain assets directly related to petitioner's racketeering activity is not. Our cases support the instinct from which

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church censor. See generally T. Emerson, System of Freedom of Expression 504 (1970). Beginning with *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), we expanded this doctrine to include not only licensing schemes requiring speech to be submitted to an administrative censor for prepublication review, but also injunctions against future speech issued by judges. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 389–390 (1973) ("[T]he protection against prior restraint at common law barred only a system of administrative censorship. . . . [T]he Court boldly stepped beyond this narrow doctrine in *Near*"). Quite obviously, however, we have never before countenanced the essentially limitless expansion of the term that petitioner proposes.

this question arises; they establish quite clearly that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct.

We have in the past rejected First Amendment challenges to statutes that impose severe prison sentences and fines as punishment for obscenity offenses. See, *e. g., Ginzburg* v. *United States*, 383 U. S. 463, 464–465, n. 2 (1966); *Smith* v. *United States*, 431 U. S. 291, 296, n. 3 (1977); *Fort Wayne Books*, 489 U. S., at 59, n. 8. Petitioner does not question the holding of those cases; he instead argues that RICO's forfeiture provisions are constitutionally overbroad because they are not limited solely to obscene materials and the proceeds from the sale of such materials. Petitioner acknowledges that this is an unprecedented use of the overbreadth principle. See Brief for Petitioner 36. The "overbreadth" doctrine, which is a departure from traditional rules of standing, permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute. See, *e. g., Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 798–801 (1984). But the RICO statute does not criminalize constitutionally protected speech and therefore is materially different from the statutes at issue in our overbreadth cases. Cf., *e. g., Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574–575 (1987).

Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech. No doubt the monetarily large forfeiture in this case may induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves out of fear that

those materials could be found obscene and thus subject them to forfeiture. But the defendant in *Fort Wayne Books* made a similar argument, which was rejected by the Court in this language:

> "[D]eterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" 489 U. S., at 60 (quoting *Smith* v. *California*, 361 U. S. 147, 154–155 (1959)).

Fort Wayne Books is dispositive of any chilling argument here, since the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine. Each racketeering charge exposes a defendant to a maximum penalty of 20 years' imprisonment and a fine of up to $250,000. 18 U. S. C. § 1963(a) (1988 ed. and Supp. III). See Brief for United States 19. Needless to say, the prospect of such a lengthy prison sentence would have a far more powerful deterrent effect on protected speech than the prospect of any sort of forfeiture. Cf. *Blanton* v. *North Las Vegas*, 489 U. S. 538, 542 (1989) (loss of liberty is a more severe form of punishment than any monetary sanction). Similarly, a fine of several hundred thousand dollars would certainly be just as fatal to most businesses—and, as such, would result in the same degree of self-censorship—as a forfeiture of assets. Yet these penalties are clearly constitutional under *Fort Wayne Books*.

We also have rejected a First Amendment challenge to a court order closing down an entire business that was engaged in expressive activity as punishment for criminal conduct. See *Arcara*, 478 U. S., at 707. Once again, petitioner does not question the holding of that case; in fact, he concedes that expressive businesses and assets can be forfeited

under RICO as punishment for, say, narcotic offenses. See Brief for Petitioner 11 ("[F]orfeiture of a media business purchased by a drug cartel would be constitutionally permissible"). Petitioner instead insists that the result here should be different because the RICO predicate acts were obscenity offenses. In *Arcara*, we held that criminal and civil sanctions having some incidental effect on First Amendment activities are subject to First Amendment scrutiny "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in [*United States* v.] *O'Brien*, [391 U. S. 367 (1968),] or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star* [*& Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983)]." 478 U. S., at 706–707 (footnote omitted). Applying that standard, we held that prostitution and lewdness, the criminal conduct at issue in *Arcara*, involve neither situation, and thus concluded that the First Amendment was not implicated by the enforcement of a general health regulation resulting in the closure of an adult bookstore. *Id.*, at 707. Under our analysis in *Arcara*, the forfeiture in this case cannot be said to offend the First Amendment. To be sure, the conduct that "drew the legal remedy" here—racketeering committed through obscenity violations—may be "expressive," see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385 (1992), but our cases clearly hold that "obscenity" can be regulated or actually proscribed consistent with the First Amendment, see, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 485 (1957); *Miller* v. *California*, 413 U. S. 15, 23 (1973).

Confronted with our decisions in *Fort Wayne Books* and *Arcara*—neither of which he challenges—petitioner's position boils down to this: Stiff criminal penalties for obscenity offenses are consistent with the First Amendment; so is the forfeiture of expressive materials as punishment for criminal conduct; but the combination of the two somehow results

in a violation of the First Amendment. We reject this counterintuitive conclusion, which in effect would say that the whole is greater than the sum of the parts.

Petitioner also argues that the forfeiture order in this case—considered atop his 6-year prison term and $100,000 fine—is disproportionate to the gravity of his offenses and therefore violates the Eighth Amendment, either as a "cruel and unusual punishment" or as an "excessive fine."[3] Brief for Petitioner 40. The Court of Appeals, though, failed to distinguish between these two components of petitioner's Eighth Amendment challenge. Instead, the court lumped the two together, disposing of them both with the general statement that the Eighth Amendment does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole. 943 F. 2d, at 836. But that statement has relevance only to the Eighth Amendment's prohibition against cruel and unusual punishments. Unlike the Cruel and Unusual Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin* v. *United States, post,* at 609–610 (emphasis and internal quotation marks omitted); accord, *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 265 (1989) ("[A]t the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense"); *id.*, at 265, n. 6. The *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine." Ac-

[3] This sense of disproportionality animates much of petitioner's First Amendment arguments as well. Questions of proportionality, however, should be dealt with directly and forthrightly under the Eighth Amendment and not be allowed to influence *sub silentio* courts' First Amendment analysis.

cord, *Austin, supra.*[4] Accordingly, the forfeiture in this case should be analyzed under the Excessive Fines Clause.

Petitioner contends that forfeiture of his entire business was an "excessive" penalty for the Government to exact "[o]n the basis of a few materials the jury ultimately decided were obscene." Brief for Petitioner 40. It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." App. to Pet. for Cert. 160. It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question whether the forfeiture was "excessive" must be considered. We think it preferable that this question be addressed by the Court of Appeals in the first instance.

For these reasons, we hold that RICO's forfeiture provisions, as applied in this case, did not violate the First Amendment, but that the Court of Appeals should have considered whether they resulted in an "excessive" penalty within the meaning of the Eighth Amendment's Excessive Fines Clause. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, concurring in the judgment in part and dissenting in part.

I agree with the Court that petitioner has not demonstrated that the forfeiture at issue here qualifies as a prior restraint as we have traditionally understood that term. I

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[4] Unlike *Austin*, this case involves *in personam* criminal forfeiture not *in rem* civil forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment.

also agree with the Court that the case should be remanded for a determination whether the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Nonetheless, I agree with JUSTICE KENNEDY that the First Amendment forbids the forfeiture of petitioner's expressive material in the absence of an adjudication that it is obscene or otherwise of unprotected character, and therefore I join Part II of his dissenting opinion.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, and with whom JUSTICE SOUTER joins as to Part II, dissenting.

The Court today embraces a rule that would find no affront to the First Amendment in the Government's destruction of a book and film business and its entire inventory of legitimate expression as punishment for a single past speech offense. Until now I had thought one could browse through any book or film store in the United States without fear that the proprietor had chosen each item to avoid risk to the whole inventory and indeed to the business itself. This ominous, onerous threat undermines free speech and press principles essential to our personal freedom.

Obscenity laws would not work unless an offender could be arrested and imprisoned despite the resulting chill on his own further speech. But, at least before today, we have understood state action directed at protected books or other expressive works themselves to raise distinct constitutional concerns. The Court's decision is a grave repudiation of First Amendment principles, and with respect I dissent.

I

A

The majority believes our cases "establish quite clearly that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct."

Ante, at 555. True, we have held that obscenity is expression which can be regulated and punished, within proper limitations, without violating the First Amendment. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747 (1982); *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57–58 (1973); *Roth* v. *United States*, 354 U. S. 476 (1957). And the majority is correct to note that we have upheld stringent fines and jail terms as punishments for violations of the federal obscenity laws. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 60 (1989); *Ginzburg* v. *United States*, 383 U. S. 463, 464–465, n. 2 (1966). But that has little to do with the destruction of protected titles and the facilities for their distribution or publication. None of our cases address that matter, or it would have been unnecessary for us to reserve the specific question four Terms ago in *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, at 60, 65.

The fundamental defect in the majority's reasoning is a failure to recognize that the forfeiture here cannot be equated with traditional punishments such as fines and jail terms. Noting that petitioner does not challenge either the 6-year jail sentence or the $100,000 fine imposed against him as punishment for his convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO), the majority ponders why RICO's forfeiture penalty should be any different. See *ante*, at 554. The answer is that RICO's forfeiture penalties are different from traditional punishments by Congress' own design as well as in their First Amendment consequences.

The federal RICO statute was passed to eradicate the infiltration of legitimate business by organized crime. Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1988 ed. and Supp. III). Earlier steps to combat organized crime were not successful, in large part because traditional penalties targeted individuals engaged in racketeering activity rather than the criminal enterprise itself. Punishing racketeers with fines and jail terms failed to

break the cycle of racketeering activity because the criminal enterprises had the resources to replace convicted racketeers with new recruits. In passing RICO, Congress adopted a new approach aimed at the economic roots of organized crime:

> "What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." S. Rep. No. 91–617, p. 79 (1969).

Criminal liability under RICO is premised on the commission of a "pattern of racketeering activity," defined by the statute as engaging in two or more related predicate acts of racketeering within a 10-year period. 18 U. S. C. § 1961(5). A RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under § 1963.* It is the mandatory forfeiture penalty that is at issue here.

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*Section 1963(a) provides that in imposing sentence on one convicted of racketeering offenses under § 1962, the district court *shall order* forfeiture of three classes of assets:

"(1) any interest the person has acquired or maintained in violation of section 1962;

"(2) any—

"(A) interest in;

"(B) security of;

"(C) claim against; or

"(D) property or contractual right of any kind affording a source of influence over;

"any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

"(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or

While forfeiture remedies have been employed with increasing frequency in civil proceedings, forfeiture remedies and penalties are the subject of historic disfavor in our country. Although *in personam* forfeiture statutes were well grounded in the English common law, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 682–683 (1974), *in personam* criminal forfeiture penalties like those authorized under § 1963 were unknown in the federal system until the enactment of RICO in 1970. See 1 C. Wright, Federal Practice and Procedure § 125.1, p. 389 (2d ed. 1982). Section 1963's forfeiture penalties are novel for their punitive character as well as for their unprecedented sweep. Civil *in rem* forfeiture is limited in application to contraband and articles put to unlawful use, or in its broadest reach, to proceeds traceable to unlawful activity. See *United States* v. *Parcel of Land, Rumson, N. J.*, 507 U. S. 111, 118–123 (1993); *The Palmyra*, 12 Wheat. 1, 14–15 (1827). Extending beyond contraband or its traceable proceeds, RICO mandates the forfeiture of property constituting the defendant's "interest in the racketeering enterprise" and property affording the violator a "source of influence" over the RICO enterprise. 18 U. S. C. § 1963(a) (1988 ed. and Supp. III). In a previous decision, we acknowledged the novelty of RICO's penalty scheme, stating that Congress passed RICO to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983).

As enacted in 1970, RICO targeted offenses then thought endemic to organized crime. 18 U. S. C. § 1961(1). When RICO was amended in 1984 to include obscenity as a predicate offense, there was no comment or debate in Congress on the First Amendment implications of the change. Act of Oct. 12, 1984, Pub. L. 98–473, 98 Stat. 2143. The consequence of adding a speech offense to a statutory scheme de-

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unlawful debt collection in violation of section 1962." 18 U. S. C. §§ 1963(a)(1)–(3).

signed to curtail a different kind of criminal conduct went far beyond the imposition of severe penalties for obscenity offenses. The result was to render vulnerable to Government destruction any business daring to deal in sexually explicit materials. The unrestrained power of the forfeiture weapon was not lost on the Executive Branch, which was quick to see in the amended statute the means and opportunity to move against certain types of disfavored speech. The Attorney General's Commission on Pornography soon advocated the use of RICO and similar state statutes to "substantially handicap" or "eliminate" pornography businesses. 1 United States Dept. of Justice, Attorney General's Commission on Pornography, Final Report 498 (1986). As these comments illustrate, the constitutional concerns raised by a penalty of this destructive capacity are distinct from the concerns raised by traditional methods of punishment.

The Court says that, taken together, our decisions in *Fort Wayne Books* and *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986), dispose of petitioner's First Amendment argument. See *ante*, at 556–558. But while instructive, neither case is dispositive. In *Fort Wayne Books* we considered a state law patterned on the federal RICO statute, and upheld its scheme of using obscenity offenses as the predicate acts resulting in fines and jail terms of great severity. We recognized that the fear of severe penalties may result in some self-censorship by cautious booksellers, but concluded that this is a necessary consequence of conventional obscenity prohibitions. 489 U. S., at 60. In rejecting the argument that the fines and jail terms in *Fort Wayne Books* infringed upon First Amendment principles, we regarded the penalties as equivalent to a sentence enhancement for multiple obscenity violations, a remedy of accepted constitutional legitimacy. *Id.*, at 59–60. We did not consider in *Fort Wayne Books* the First Amendment implications of extensive penal forfeitures, including the official destruction of protected expression. Further, while *Fort Wayne Books* acknowledges that some

degree of self-censorship may be unavoidable in obscenity regulation, the alarming element of the forfeiture scheme here is the pervasive danger of government censorship, an issue, I submit, the Court does not confront.

In *Arcara*, we upheld against First Amendment challenge a criminal law requiring the temporary closure of an adult bookstore as a penal sanction for acts of prostitution occurring on the premises. We did not subject the closure penalty to First Amendment scrutiny even though the collateral consequence of its imposition would be to affect interests of traditional First Amendment concern. We said that such scrutiny was not required when a criminal penalty followed conduct "manifest[ing] absolutely no element of protected expression." 478 U. S., at 705. That the RICO prosecution of Alexander involved the targeting of a particular class of unlawful speech itself suffices to distinguish the instant case from *Arcara*. There can be little doubt that regulation and punishment of certain classes of unprotected speech have implications for other speech that is close to the proscribed line, speech which is entitled to the protections of the First Amendment. See *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Further, a sanction requiring the temporary closure of a bookstore cannot be equated, as it is under the Court's unfortunate analysis, see *ante*, at 556–557, with a forfeiture punishment mandating its permanent destruction.

B

The majority tries to occupy the high ground by assuming the role of the defender of the doctrine of prior restraint. It warns that we disparage the doctrine if we reason from it. But as an analysis of our prior restraint cases reveals, our application of the First Amendment has adjusted to meet new threats to speech. The First Amendment is a rule of substantive protection, not an artifice of categories. The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its pro-

tected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real.

Relying on the distinction between prior restraints and subsequent punishments, *ante*, at 548, 553–554, the majority labels the forfeiture imposed here a punishment and dismisses any further debate over the constitutionality of the forfeiture penalty under the First Amendment. Our cases do recognize a distinction between prior restraints and subsequent punishments, but that distinction is neither so rigid nor so precise that it can bear the weight the Court places upon it to sustain the destruction of a speech business and its inventory as a punishment for past expression.

In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents. See *Staub* v. *City of Baxley*, 355 U. S. 313, 322 (1958); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952); *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 222 (1964) (Harlan, J., dissenting); see also M. Nimmer, Nimmer on Freedom of Speech §4.03, p. 4–14 (1984). In contrast are laws which punish speech or expression only after it has occurred and been found unlawful. See *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 440–442 (1957). While each mechanism, once imposed, may abridge speech in a direct way by suppressing it, or in an indirect way by chilling its dissemination, we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments. See, *e. g.*, *Arcara* v. *Cloud Books, Inc.*, *supra*, at 705–706; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975); *Kingsley Books, Inc.* v. *Brown*, *supra*, at 440–442. In *Southeastern Promotions, Ltd.* v. *Conrad*, we explained that "[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after*

they break the law than to throttle them and all others beforehand." 420 U. S., at 559.

It has been suggested that the distinction between prior restraints and subsequent punishments may have slight utility, see Nimmer, *supra*, § 4.04, at 4–18 to 4–25, for in a certain sense every criminal obscenity statute is a prior restraint because of the caution a speaker or bookseller must exercise to avoid its imposition. See *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 324 (1980) (WHITE, J., joined by REHNQUIST, J., dissenting); see also Jeffries, Rethinking Prior Restraint, 92 Yale L. J. 409, 437 (1982). To be sure, the term "prior restraint" is not self-defining. One problem, of course, is that some governmental actions may have the characteristics both of punishment and prior restraint. A historical example is the sentence imposed on Hugh Singleton in 1579 after he had enraged Elizabeth I by printing a certain tract. See F. Siebert, Freedom of the Press in England, 1476–1776, pp. 91–92 (1952). Singleton was condemned to lose his right hand, thus visiting upon him both a punishment and a disability encumbering all further printing. Though the sentence appears not to have been carried out, it illustrates that a prior restraint and a subsequent punishment may occur together. Despite the concurrent operation of the two kinds of prohibitions in some cases, the distinction between them persists in our law, and it is instructive here to inquire why this is so.

Early in our legal tradition the source of the distinction was the English common law, in particular the oft cited passage from William Blackstone's 18th-century Commentaries on the Laws of England. He observed as follows:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to

> destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries *151–*152.

The English law which Blackstone was compiling had come to distrust prior restraints, but with little accompanying condemnation of subsequent punishments. Part of the explanation for this lies in the circumstance that, in the centuries before Blackstone wrote, prior censorship, including licensing, was the means by which the Crown and the Parliament controlled speech and press. See Siebert, *supra*, at 56–63, 68–74. As those methods were the principal means used by government to control speech and press, it follows that an unyielding populace would devote its first efforts to avoiding or repealing restrictions in that form.

Even as Blackstone wrote, however, subsequent punishments were replacing the earlier censorship schemes as the mechanism for government control over disfavored speech in England. Whether Blackstone's apparent tolerance of subsequent punishments resulted from his acceptance of the English law as it then existed or his failure to grasp the potential threat these measures posed to liberty, or both, subsequent punishment in the broad sweep that he commented upon would be in flagrant violation of the principles of free speech and press that we have come to know and understand as being fundamental to our First Amendment freedoms. Indeed, in the beginning of our Republic, James Madison argued against the adoption of Blackstone's definition of free speech under the First Amendment. Said Madison: "[T]his idea of the freedom of the press can never be admitted to be the American idea of it" because a law inflicting penalties would have the same effect as a law authorizing a prior restraint. 6 Writings of James Madison 386 (G. Hunt ed. 1906).

The enactment of the alien and sedition laws early in our own history is an unhappy testament to the allure that re-

strictive measures have for governments tempted to control the speech and publications of their people. And our earliest cases tended to repeat the suggestion by Blackstone that prior restraints were the sole concern of First Amendment protections. See *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 462 (1907); *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897). In time, however, the Court rejected the notion that First Amendment freedoms under our Constitution are coextensive with liberties available under the common law of England. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248–249 (1936). From this came the conclusion that "[t]he protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, n. 3 (1942).

As our First Amendment law has developed, we have not confined the application of the prior restraint doctrine to its simpler forms, outright licensing or censorship before speech takes place. In considering governmental measures deviating from the classic form of a prior restraint yet posing many of the same dangers to First Amendment freedoms, we have extended prior restraint protection with some latitude, toward the end of declaring certain governmental actions to fall within the presumption of invalidity. This approach is evident in *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), the leading case in which we invoked the prior restraint doctrine to invalidate a state injunctive decree.

In *Near*, a Minnesota statute authorized judicial proceedings to abate as a nuisance a "'malicious, scandalous and defamatory newspaper, magazine or other periodical.'" *Id.*, at 701–702. In a suit brought by the attorney for Hennepin County it was established that Near had published articles in various editions of The Saturday Press in violation of the statutory standard. *Id.*, at 703–705. Citing the instance of these past unlawful publications, the court enjoined any fu-

ture violations of the state statute. *Id.*, at 705. In one sense the injunctive order, which paralleled the nuisance statute, did nothing more than announce the conditions under which some later punishment might be imposed, for one presumes that contempt could not be found until there was a further violation in contravention of the order. But in *Near* the publisher, because of past wrongs, was subjected to active state intervention for the control of future speech. We found that the scheme was a prior restraint because it embodied "the essence of censorship." *Id.*, at 713. This understanding is confirmed by our later decision in *Kingsley Books* v. *Brown*, where we said that it had been enough to condemn the injunction in *Near* that Minnesota had "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." 354 U. S., at 445.

Indeed the Court has been consistent in adopting a speech-protective definition of prior restraint when the state attempts to attack future speech in retribution for a speaker's past transgressions. See *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980) *(per curiam)* (invalidating as a prior restraint procedure authorizing state courts to abate as a nuisance an adult theater which had exhibited obscene films in the past because the effect of the procedure was to prevent future exhibitions of pictures not yet found to be obscene). It is a flat misreading of our precedents to declare as the majority does that the definition of a prior restraint includes only those measures which impose a "legal impediment," *ante*, at 551, on a speaker's ability to engage in future expressive activity. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963), best illustrates the point. There a state commission did nothing more than warn booksellers that certain titles could be obscene, implying that criminal prosecutions could follow if their warnings were not heeded. The commission had no formal enforcement powers, and failure to heed its warnings was not a criminal offense. Although

the commission could impose no legal impediment on a speaker's ability to engage in future expressive activity, we held that scheme was an impermissible "system of prior administrative restraints." *Ibid.* There we said: "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.*, at 67. If mere warning against sale of certain materials was a prior restraint, I fail to see why the physical destruction of a speech enterprise and its protected inventory is not condemned by the same doctrinal principles.

One wonders what today's majority would have done if faced in *Near* with a novel argument to extend the traditional conception of the prior restraint doctrine. In view of the formalistic approach the Court advances today, the Court likely would have rejected Near's pleas on the theory that to accept his argument would be to "blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not." *Ante*, at 554. In so holding the Court would have ignored, as the Court does today, that the applicability of First Amendment analysis to a governmental action depends not alone upon the name by which the action is called, but upon its operation and effect on the suppression of speech. *Near, supra*, at 708 ("[T]he court has regard to substance and not to mere matters of form, and . . . in accordance with familiar principles . . . statute[s] must be tested by [their] operation and effect"). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101 (1979) (the First Amendment's application to a civil or criminal sanction is not determined solely by whether that action is viewed "as a prior restraint or as a penal sanction"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S., at 552–553 (challenged action is "indistinguishable in its censoring effect" from official actions consistently identified as prior restraints); *Schneider* v. *State (Town*

of Irvington), 308 U. S. 147, 161 (1939) ("In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation").

The cited cases identify a progression in our First Amendment jurisprudence which results from a more fundamental principle. As governments try new ways to subvert essential freedoms, legal and constitutional systems respond by making more explicit the nature and the extent of the liberty in question. First in *Near*, and later in *Bantam Books* and *Vance*, we were faced with official action which did not fall within the traditional meaning of the term "prior restraint," yet posed many of the same censorship dangers. Our response was to hold that the doctrine not only includes licensing schemes requiring speech to be submitted to a censor for review prior to dissemination, but also encompasses injunctive systems which threaten or bar future speech based on some past infraction.

Although we consider today a new method of government control with unmistakable dangers of official censorship, the majority concludes that First Amendment freedoms are not endangered because forfeiture follows a lawful conviction for obscenity offenses. But this explanation does not suffice. The rights of free speech and press in their broad and legitimate sphere cannot be defeated by the simple expedient of punishing after in lieu of censoring before. See *Smith* v. *Daily Mail Publishing Co.*, *supra*, at 101–102; *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940). This is so because in some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may be to raise the same concerns which inform all of our prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech.

The operation and effect of RICO's forfeiture remedies are different from a heavy fine or a severe jail sentence because

RICO's forfeiture provisions are different in purpose and kind from ordinary criminal sanctions. See *supra*, at 563–565. The Government's stated purpose under RICO, to destroy or incapacitate the offending enterprise, bears a striking resemblance to the motivation for the state nuisance statute the Court struck down as an impermissible prior restraint in *Near*. The purpose of the state statute in *Near* was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U. S., at 711. In the context of the First Amendment, it is quite odd indeed to apply a measure implemented not only to deter unlawful conduct by imposing punishment after violations, but to "'incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.'" *Russello* v. *United States*, 464 U. S., at 28, quoting 116 Cong. Rec. 18955 (1970) (remarks of sponsor Sen. McClellan). The particular nature of Ferris Alexander's activities ought not blind the Court to what is at stake here. Under the principle the Court adopts, any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction.

Assuming the constitutionality of the mandatory forfeiture under § 1963 when applied to nonspeech-related conduct, the constitutional analysis must be different when that remedy is imposed for violations of the federal obscenity laws. "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." *Smith* v. *California*, 361 U. S. 147, 150–151 (1959). The regulation of obscenity, often separated from protected expression only by a "dim and uncertain line," must be accomplished through "procedures that will ensure against the curtailment of constitutionally protected expression." *Bantam Books* v. *Sullivan*, 372 U. S., at 66. Because freedoms of expression are "vulnerable to gravely damaging yet barely visible encroach-

ments," *ibid.*, the government must use measures that are sensitive to First Amendment concerns in its task of regulating or punishing speech. *Speiser* v. *Randall*, 357 U. S., at 525.

Whatever one might label the RICO forfeiture provisions at issue in this case, be it effective, innovative, or Draconian, § 1963 was not designed for sensitive and exacting application. What is happening here is simple: Books and films are condemned and destroyed not for their own content but for the content of their owner's prior speech. Our law does not permit the government to burden future speech for this sort of taint. Section 1963 requires trial courts to forfeit not only the unlawful items and any proceeds from their sale, but also the defendant's entire interest in the enterprise involved in the RICO violations and any assets affording the defendant a source of influence over the enterprise. 18 U. S. C. §§ 1963(a)(1)–(3) (1988 ed. and Supp. III). A defendant's exposure to this massive penalty is grounded on the commission of just two or more related obscenity offenses committed within a 10-year period. Aptly described, RICO's forfeiture provisions "arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use." *Fort Wayne Books*, 489 U. S., at 85 (STEVENS, J., concurring in part and dissenting in part).

What is at work in this case is not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech. The forfeiture provisions accomplish this in a direct way by seizing speech presumed to be protected along with the instruments of its dissemination, and in an indirect way by threatening all who engage in the business of distributing adult or sexually explicit materials with the same disabling measures. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 390 (1973) (the special vice of the prior restraint is suppression of speech, either directly or by in-

ducing caution in the speaker, prior to a determination that the targeted speech is unprotected by the First Amendment).

In a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state, public confidence in the institutions devoted to the dissemination of written matter and films is essential. That confidence erodes if it is perceived that speakers and the press are vulnerable for all of their expression based on some errant expression in the past. Independence of speech and press can be just as compromised by the threat of official intervention as by the fact of it. See *Bantam Books, Inc.* v. *Sullivan, supra,* at 70. Though perhaps not in the form of a classic prior restraint, the application of the forfeiture statute here bears its censorial cast.

Arcara recognized, as the Court today does not, the vital difference between a punishment imposed for a speech offense and a punishment imposed for some other crime. Where the government seeks forfeiture of a bookstore because of its owner's drug offenses, there is little reason to surmise, absent evidence of selective prosecution, that abolishing the bookstore is related to the government's disfavor of the publication outlet or its activities. Where, however, RICO forfeiture stems from a previous speech offense, the punishment serves not only the Government's interest in purging organized-crime taint, but also its interest in deterring the activities of the speech-related business itself. The threat of a censorial motive and of ongoing speech supervision by the state justifies the imposition of First Amendment protection. Free speech principles, well established by our cases, require in this case that the forfeiture of the inventory and of the speech distribution facilities be held invalid.

The distinct concern raised by § 1963 forfeiture penalties is not a proportionality concern; all punishments are subject to analysis for proportionality and this concern should be addressed under the Eighth Amendment. See *Austin* v.

United States, post, p. 602. Here, the question is whether, when imposed as punishment for violation of the federal obscenity laws, the operation of RICO's forfeiture provisions is an exercise of Government censorship and control over protected speech as condemned in our prior restraint cases. In my view the effect is just that. For this reason I would invalidate those portions of the judgment which mandated the forfeiture of petitioner's business enterprise and inventory, as well as all property affording him a source of influence over that enterprise.

II

Quite apart from the direct bearing that our prior restraint cases have on the entire forfeiture that was ordered in this case, the destruction of books and films that were not obscene and not adjudged to be so is a remedy with no parallel in our cases. The majority says that our cases "establish quite clearly that the First Amendment does not prohibit . . . forfeiture of expressive materials as punishment for criminal conduct." See *ante,* at 555. But the single case cited in support of this stark new threat to all speech enterprises is *Arcara* v. *Cloud Books, Inc. Arcara,* as discussed, *supra,* at 565, is quite inapposite. There we found unconvincing the argument that protected bookselling activities were burdened by the closure, saying that the owners "remain free to sell [and the public remains free to acquire] the same materials at another location." 478 U. S., at 705. Alexander and the public do not have those choices here for a simple reason: The Government has destroyed the inventory. Further, the sanction in *Arcara* did not involve a complete confiscation or destruction of protected expression as did the forfeiture in this case. Here the inventory forfeited consisted of hundreds of original titles and thousands of copies, all of which are presumed to be protected speech. In fact, some of the materials seized were the very ones the jury here determined not to be obscene. Even so, all of the inventory was seized and destroyed.

Even when interim pretrial seizures are used, we have been careful to say that First Amendment materials cannot be taken out of circulation until they have been determined to be unlawful. "[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books*, 489 U. S., at 63. See *id.*, at 65–66; *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326, n. 5 (1979) (the First Amendment imposes special constraints on searches for, and seizures of, presumptively protected materials).

In *Marcus* v. *Search Warrant*, 367 U. S. 717, 731–733 (1961), we invalidated a mass pretrial seizure of allegedly obscene publications achieved through a warrant that was vague and unspecific. The constitutional defect there was that the seizure was imposed without safeguards necessary to assure nonobscene material the constitutional protection to which it is entitled. In similar fashion we invalidated, in *A Quantity of Copies of Books* v. *Kansas*, 378 U. S., at 211–213, a state procedure authorizing seizure of books alleged to be obscene prior to hearing, even though the system involved judicial examination of some of the seized titles. While the force behind the special protection accorded searches for and seizures of First Amendment materials is the risk of prior restraint, see *Maryland* v. *Macon*, 472 U. S. 463, 470 (1985), in substance the rule prevents seizure and destruction of expressive materials in circumstances such as are presented in this case without an adjudication of their unlawful character.

It follows from the search cases in which the First Amendment required exacting protection, that one title does not become seizable or tainted because of its proximity on the shelf to another. And if that is the rule for interim seizures, it follows with even greater force that protected materials cannot be destroyed altogether for some alleged taint from an owner who committed a speech violation. In attempting

to distinguish the holdings of *Marcus* and *A Quantity of Books*, the Court describes the constitutional infirmity in those cases as follows: "[T]he government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." *Ante*, at 551. But the same constitutional defect is present in the case before us today, and the Court fails to explain why it is not fatal to the forfeiture punishment here under review. Thus, while in the past we invalidated seizures which resulted in a temporary removal of presumptively protected materials from circulation, today the Court approves of Government measures having the same permanent effect. In my view, the forfeiture of expressive material here that had not been adjudged to be obscene, or otherwise without the protection of the First Amendment, was unconstitutional.

* * *

Given the Court's principal holding, I can interpose no objection to remanding the case for further consideration under the Eighth Amendment. But it is unnecessary to reach the Eighth Amendment question. The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles. I dissent from the judgment and from the opinion of the Court.

Syllabus

DAUBERT ET UX., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR DAUBERT, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–102. Argued March 30, 1993—Decided June 28, 1993

Petitioners, two minor children and their parents, alleged in their suit against respondent that the children's serious birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert's affidavit concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although petitioners had responded with the testimony of eight other well-credentialed experts, who based their conclusion that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies, the court determined that this evidence did not meet the applicable "general acceptance" standard for the admission of expert testimony. The Court of Appeals agreed and affirmed, citing *Frye* v. *United States*, 54 App. D. C. 46, 47, 293 F. 1013, 1014, for the rule that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

Held: The Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial. Pp. 585–597.

(a) *Frye*'s "general acceptance" test was superseded by the Rules' adoption. The Rules occupy the field, *United States* v. *Abel*, 469 U. S. 45, 49, and, although the common law of evidence may serve as an aid to their application, *id.*, at 51–52, respondent's assertion that they somehow assimilated *Frye* is unconvincing. Nothing in the Rules as a whole or in the text and drafting history of Rule 702, which specifically governs expert testimony, gives any indication that "general acceptance" is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the Rules' liberal thrust and their general approach of relaxing the traditional barriers to "opinion" testimony. Pp. 585–589.

(b) The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial

judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific . . . knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word "knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Pp. 589–592.

(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 592–595.

(d) Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising "general acceptance" standard, is the appropriate means by which evidence based on valid principles may be challenged. That even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. Pp. 595–597.

951 F. 2d 1128, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II–A, and the opinion of the Court with respect to Parts II–B, II–C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 598.

Counsel

Michael H. Gottesman argued the cause for petitioners. With him on the briefs were *Kenneth J. Chesebro, Barry J. Nace, David L. Shapiro,* and *Mary G. Gillick.*

Charles Fried argued the cause for respondent. With him on the brief were *Charles R. Nesson, Joel I. Klein, Richard G. Taranto, Hall R. Marston, George E. Berry, Edward H. Stratemeier,* and *W. Glenn Forrester.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Dan Morales,* Attorney General of Texas, *Mark Barnett,* Attorney General of South Dakota, *Marc Racicot,* Attorney General of Montana, *Larry EchoHawk,* Attorney General of Idaho, and *Brian Stuart Koukoutchos;* for the American Society of Law, Medicine and Ethics et al. by *Joan E. Bertin, Marsha S. Berzon,* and *Albert H. Meyerhoff;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Roxanne Barton Conlin;* for Ronald Bayer et al. by *Brian Stuart Koukoutchos, Priscilla Budeiri, Arthur Bryant,* and *George W. Conk;* and for Daryl E. Chubin et al. by *Ron Simon* and *Nicole Schultheis.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Wallace, Assistant Attorney General Gerson, Miguel A. Estrada, Michael Jay Singer,* and *John P. Schnitker;* for the American Insurance Association by *William J. Kilberg, Paul Blankenstein, Bradford R. Clark,* and *Craig A. Berrington;* for the American Medical Association et al. by *Carter G. Phillips, Mark D. Hopson,* and *Jack R. Bierig;* for the American Tort Reform Association by *John G. Kester* and *John W. Vardaman, Jr.;* for the Chamber of Commerce of the United States by *Timothy B. Dyk, Stephen A. Bokat,* and *Robin S. Conrad;* for the Pharmaceutical Manufacturers Association by *Louis R. Cohen* and *Daniel Marcus;* for the Product Liability Advisory Council, Inc., et al. by *Victor E. Schwartz, Robert P. Charrow,* and *Paul F. Rothstein;* for the Washington Legal Foundation by *Scott G. Campbell, Daniel J. Popeo,* and *Richard A. Samp;* and for Nicolaas Bloembergen et al. by *Martin S. Kaufman.*

Briefs of *amici curiae* were filed for the American Association for the Advancement of Science et al. by *Richard A. Meserve* and *Bert Black;* for the American College of Legal Medicine by *Miles J. Zaremski;* for the Carnegie Commission on Science, Technology, and Government by *Steven G. Gallagher, Elizabeth H. Esty,* and *Margaret A. Berger;* for the Defense Research Institute, Inc., by *Joseph A. Sherman, E. Wayne Taff,* and *Harvey L. Kaplan;* for the New England Journal of Medicine et al. by *Michael Malina* and *Jeffrey I. D. Lewis;* for A Group of American Law Professors

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription antinausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.[1] Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects—more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (*i. e.*, a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

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by *Donald N. Bersoff;* for Alvan R. Feinstein by *Don M. Kennedy, Loretta M. Smith,* and *Richard A. Oetheimer;* and for Kenneth Rothman et al. by *Neil B. Cohen.*

[1] Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34–44.

Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.[2] These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is "'sufficiently established to have general acceptance in the field to which it belongs.'" 727 F. Supp. 570, 572 (SD Cal. 1989), quoting *United States* v. *Kilgus*, 571 F. 2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence

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[2] For example, Shanna Helen Swan, who received a master's degree in biostatistics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the section of the California Department of Health and Services that determines causes of birth defects and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. *Id.*, at 113–114, 131–132. Stuart A. Newman, who received his bachelor's degree in chemistry from Columbia University and his master's and doctorate in chemistry from the University of Chicago, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. *Id.*, at 54–56. The credentials of the others are similarly impressive. See *id.*, at 61–66, 73–80, 148–153, 187–192, and Attachments 12, 20, 21, 26, 31, and 32 to Petitioners' Opposition to Summary Judgment in No. 84-2013-G(I) (SD Cal.).

is not admissible to establish causation. 727 F. Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F. 2d 1128 (1991). Citing *Frye* v. *United States*, 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. 951 F. 2d, at 1129–1130. The court declared that expert opinion based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be 'generally accepted as a reliable technique.'" *Id.*, at 1130, quoting *United States* v. *Solomon*, 753 F. 2d 1522, 1526 (CA9 1985).

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F. 2d, at 1130–1131. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community." *Id.*, at 1130. Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.*, at 1131. The

court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, 506 U. S. 914 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e. g.*, *United States* v. *Shorter*, 257 U. S. App. D. C. 358, 363–364, 809 F. 2d 54, 59–60 (applying the "general acceptance" standard), cert. denied, 484 U. S. 817 (1987), with *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F. 2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

II

A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.[3]

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages

[3] For a catalog of the many cases on either side of this controversy, see P. Giannelli & E. Imwinkelried, Scientific Evidence § 1–5, pp. 10–14 (1986 and Supp. 1991).

> is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" 54 App. D. C., at 47, 293 F., at 1014 (emphasis added).

Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid.*

The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.[4]

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[4] See, *e. g.*, Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of *Agent Orange* and Bendectin Litigation, 86 Nw. U. L. Rev. 643 (1992) (hereinafter Green); Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 876–885 (1992); Hanson, James Alphonzo Frye is Sixty-Five Years Old; Should He Retire?, 16 West. St. U. L. Rev. 357 (1989); Black, A Unified Theory of Scientific Evidence, 56 Ford. L. Rev. 595 (1988); Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N. C. L. Rev. 1 (1988); Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 235 (1986); Giannelli, The Admissibility of Novel Scientific Evidence: *Frye* v. *United States*, a Half-Century Later, 80 Colum. L. Rev. 1197 (1980); The Supreme Court, 1986 Term, 101 Harv. L. Rev. 7, 119, 125–127 (1987).

Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term—"*Frye*-ologist"—has been advanced to describe those who take part. See Behringer, Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 237, 239 (1986), quoting Lacey, Scientific Evidence, 24 Jurimetrics J. 254, 264 (1984).

Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.[5] We agree.

We interpret the legislatively enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153, 163 (1988). Rule 402 provides the baseline:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Rules' basic standard of relevance thus is a liberal one.

Frye, of course, predated the Rules by half a century. In *United States* v. *Abel*, 469 U. S. 45 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.*, at 49, but, quoting Professor Cleary, the Reporter,

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[5] Like the question of *Frye*'s merit, the dispute over its survival has divided courts and commentators. Compare, *e. g.*, *United States* v. *Williams*, 583 F. 2d 1194 (CA2 1978) (*Frye* is superseded by the Rules of Evidence), cert. denied, 439 U. S. 1117 (1979), with *Christophersen* v. *Allied-Signal Corp.*, 939 F. 2d 1106, 1111, 1115–1116 (CA5 1991) (en banc) (*Frye* and the Rules coexist), cert. denied, 503 U. S. 912 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03], pp. 702–36 to 702–37 (1988) (hereinafter Weinstein & Berger) (*Frye* is dead), and M. Graham, Handbook of Federal Evidence § 703.2 (3d ed. 1991) (*Frye* lives). See generally P. Giannelli & E. Imwinkelried, Scientific Evidence § 1–5, at 28–29 (citing authorities).

explained that the common law nevertheless could serve as an aid to their application:

> "'In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . . ." In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.'" *Id.*, at 51–52.

We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.*, at 50–51. In *Bourjaily* v. *United States*, 483 U. S. 171 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a "general acceptance" standard. The drafting history makes no mention of *Frye*, and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp.* v. *Rainey*, 488 U. S., at 169 (citing Rules 701 to 705). See also Weinstein, Rule 702 of the Federal Rules of Evidence is

Sound; It Should Not Be Amended, 138 F. R. D. 631 (1991) ("The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts"). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.[6]

B

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.[7] Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "*If scientific*, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue" an expert "may testify *thereto*." (Emphasis added.) The subject of an expert's testimony must

[6] Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

[7] THE CHIEF JUSTICE "do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility," *post*, at 600, but would neither say how it does so nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

be "scientific . . . knowledge."[8] The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, *e. g.*, Brief for Nicolaas Bloembergen et al. as *Amici Curiae* 9 ("Indeed, scientists do not assert that they know what is immutably 'true'—they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science et al. as *Amici Curiae* 7–8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i. e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.[9]

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[8] Rule 702 also applies to "technical, or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

[9] We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). See Black, 56 Ford. L. Rev., at 599. Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimet-

Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States* v. *Downing*, 753 F. 2d 1224, 1242 (CA3 1985) ("An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness"

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rics J. 249, 256 (1986), our reference here is to *evidentiary* reliability—that is, trustworthiness. Cf., *e. g.*, Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U. S. C. App., p. 755 ("'[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'" (citation omitted)); Advisory Committee's Notes on Art. VIII of Rules of Evidence, 28 U. S. C. App., p. 770 (hearsay exceptions will be recognized only "under circumstances supposed to furnish guarantees of trustworthiness"). In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.

standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U. S. C. App., p. 755 (citation omitted)—is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

C

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),[10] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[11] This entails a preliminary assessment of whether the reasoning or method-

[10] Rule 104(a) provides:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges." These matters should be established by a preponderance of proof. See *Bourjaily* v. *United States*, 483 U. S. 171, 175–176 (1987).

[11] Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.

ology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers 61–76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 263 JAMA 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, Reliable Knowledge: An Exploration

of the Grounds for Belief in Science 130–133 (1978); Relman & Angell, How Good Is Peer Review?, 321 New Eng. J. Med. 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, *e. g.*, *United States* v. *Smith*, 869 F. 2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States* v. *Williams*, 583 F. 2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U. S. 1117 (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States* v. *Downing*, 753 F. 2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," *Downing*, 753 F. 2d, at 1238, may properly be viewed with skepticism.

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.[12] Its overarching subject is the scientific valid-

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[12] A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, *e. g.*, *Downing*, 753 F. 2d, at 1238–1239 (on which our discussion draws in part); 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42 (on which the *Downing* court in turn partially relied); McCormick, Scientific Evidence: Defin-

ity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F. R. D., at 632.

III

We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific as-

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ing a New Approach to Admissibility, 67 Iowa L. Rev. 879, 911–912 (1982); and Symposium on Science and the Rules of Evidence, 99 F. R. D. 187, 231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.

sertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock* v. *Arkansas*, 483 U. S. 44, 61 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56. Cf., *e. g.*, *Turpin* v. *Merrell Dow Pharmaceuticals, Inc.*, 959 F. 2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), cert. denied, 506 U. S. 826 (1992); *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F. 2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F. 2d 166 (CA5 1989), cert. denied, 494 U. S. 1046 (1990); Green 680–681. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, *e. g.*, Brief for Ronald Bayer et al. as *Amici Curiae*. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest

for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.[13]

IV

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Ac-

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[13] This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral. . . . In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, The Nature of the Judicial Process 178–179 (1921).

cordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

The petition for certiorari in this case presents two questions: first, whether the rule of *Frye* v. *United States*, 54 App. D. C. 46, 293 F. 1013 (1923), remains good law after the enactment of the Federal Rules of Evidence; and second, if *Frye* remains valid, whether it requires expert scientific testimony to have been subjected to a peer review process in order to be admissible. The Court concludes, correctly in my view, that the *Frye* rule did not survive the enactment of the Federal Rules of Evidence, and I therefore join Parts I and II–A of its opinion. The second question presented in the petition for certiorari necessarily is mooted by this holding, but the Court nonetheless proceeds to construe Rules 702 and 703 very much in the abstract, and then offers some "general observations." *Ante*, at 593.

"General observations" by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations—they are not applied to deciding whether particular testimony was or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their *amici*. Twenty-two *amicus* briefs have been filed in the case, and indeed the Court's opinion contains no fewer than 37 citations to *amicus* briefs and other secondary sources.

The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 702 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

But even if it were desirable to make "general observations" not necessary to decide the questions presented, I cannot subscribe to some of the observations made by the Court. In Part II–B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante*, at 590–592. Federal Rule of Evidence 402 provides, as the Court points out, that "[e]vidence which is not relevant is not admissible." But there is no similar reference in the Rule to "reliability." The Court constructs its argument by parsing the language "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, . . . an expert . . . may testify thereto . . . ." Fed. Rule Evid. 702. It stresses that the subject of the expert's testimony must be "scientific . . . knowledge," and points out that "scientific" "implies a grounding in the methods and procedures of science" and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." *Ante*, at 590. From this it concludes that "scientific knowledge" must be "derived by the scientific method." *Ibid.* Proposed testimony, we are told, must be supported by "appropriate validation." *Ibid.* Indeed, in footnote 9, the Court decides that "[i]n a case involving scientific evidence, *eviden-*

tiary reliability will be based upon *scientific validity.*" *Ante*, at 591, n. 9 (emphasis in original).

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of "technical or other specialized knowledge"—the other types of expert knowledge to which Rule 702 applies—or are the "general observations" limited only to "scientific knowledge"? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge" be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 592–593. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 593. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the "'criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.'" *Ibid.*

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think

it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

Syllabus

AUSTIN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-6073. Argued April 20, 1993—Decided June 28, 1993

After a state court sentenced petitioner Austin on his guilty plea to one count of possessing cocaine with intent to distribute in violation of South Dakota law, the United States filed an *in rem* action in Federal District Court against his mobile home and auto body shop under 21 U. S. C. §§ 881(a)(4) and (a)(7), which provide for the forfeiture of, respectively, vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes. In granting the Government summary judgment on the basis of an officer's affidavit that Austin had brought two grams of cocaine from the mobile home to the body shop in order to consummate a prearranged sale there, the court rejected Austin's argument that forfeiture of his properties would violate the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, agreeing with the Government that the Eighth Amendment is inapplicable to *in rem* civil forfeitures.

Held:

1. Forfeiture under §§ 881(a)(4) and (a)(7) is a monetary punishment and, as such, is subject to the limitations of the Excessive Fines Clause. Pp. 606–622.

(a) The determinative question is not, as the Government would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal. The Eighth Amendment's text is not expressly limited to criminal cases, and its history does not require such a limitation. Rather, the crucial question is whether the forfeiture is monetary punishment, with which the Excessive Fines Clause is particularly concerned. Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can only be explained as serving in part to punish. See *United States* v. *Halper*, 490 U. S. 435, 448. Thus, consideration must be given to whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today. Pp. 606–611.

(b) A review of English and American law before, at the time of, and following the ratification of the Eighth Amendment demonstrates that forfeiture generally, and statutory *in rem* forfeiture in particular,

Syllabus

historically have been understood, at least in part, as punishment. See, *e. g., Peisch* v. *Ware*, 4 Cranch 347, 364. The same understanding runs through this Court's cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. See, *e. g., Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 683, 686, 687. Pp. 611–618.

(c) Forfeitures under §§ 881(a)(4) and (a)(7) are properly considered punishment today, since nothing in these provisions contradicts the historical understanding, since both sections clearly focus on the owner's culpability by expressly providing "innocent owner" defenses and by tying forfeiture directly to the commission of drug offenses, and since the legislative history confirms that Congress understood the provisions as serving to deter and to punish. Thus, even assuming that the sections serve some remedial purpose, it cannot be concluded that forfeiture under the sections serves only that purpose. Pp. 619–622.

2. The Court declines to establish a test for determining whether a forfeiture is constitutionally "excessive," since prudence dictates that the lower courts be allowed to consider that question in the first instance. Pp. 622–623.

964 F. 2d 814, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 623. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 628.

Richard L. Johnson argued the cause for petitioner. With him on the briefs was *Scott N. Peters*.

Miguel A. Estrada argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Keeney,* and *Thomas E. Booth.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Gerard E. Lynch, Steven R. Shapiro,* and *John A. Powell;* and for the National Association of Criminal Defense Lawyers by *David B. Smith* and *Justin M. Miller.*

Roger L. Conner, Robert Teir, Edward S. G. Dennis, Jr., and *Peter Buscemi* filed a brief for the American Alliance for Rights and Responsibilities et al. urging affirmance.

A brief of *amici curiae* was filed for the State of Arizona et al. by *Grant Woods,* Attorney General of Arizona, and *Cameron H. Holmes* and *Sandra*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U. S. C. §§ 881(a)(4) and (a)(7). We hold that it does and therefore remand the case for consideration of the question whether the forfeiture at issue here was excessive.

I

On August 2, 1990, petitioner Richard Lyle Austin was indicted on four counts of violating South Dakota's drug laws. Austin ultimately pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced by the state court to seven years' imprisonment. On September 7, the United States filed an *in rem* action in the United States District Court for the District of South Dakota seeking forfeiture of Austin's mobile home and auto body shop under 21

L. Janzen, Assistant Attorneys General, *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, and *Gary W. Schons*, *Domenick Galluzzo*, Acting Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Larry EchoHawk* of Idaho, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Michael Carpenter* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Michael Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Tom Udall* of New Mexico, *Michael F. Easley* of North Carolina, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Dan Morales* of Texas, *Jan Graham* of Utah, *Stephen D. Rosenthal* of Virginia, *Christine O. Gregoire* of Washington, *Joseph B. Meyer* of Wyoming, and *Rosalie Simmonds Ballentine* of the Virgin Islands.

U. S. C. §§ 881(a)(4) and (a)(7).[1] Austin filed a claim and an answer to the complaint.

On February 4, 1991, the United States made a motion, supported by an affidavit from Sioux Falls Police Officer Donald Satterlee, for summary judgment. According to Satterlee's affidavit, Austin met Keith Engebretson at Austin's body shop on June 13, 1990, and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine which he sold to Engebretson. State authorities executed a search warrant on the body shop and mobile home the following day. They discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash. App. 13. In opposing summary judgment, Austin argued that forfeiture of the properties would violate the Eighth Amendment.[2] The District Court rejected this argument and entered summary judgment for the United States. *Id.*, at 19.

The United States Court of Appeals for the Eighth Circuit "reluctantly agree[d] with the government" and affirmed.

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[1] These statutes provide for the forfeiture of:

"(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution]

. . . . . .

"(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . ."

Each provision has an "innocent owner" exception. See §§ 881(a)(4)(C) and (a)(7).

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amdt. 8.

United States v. *One Parcel of Property*, 964 F. 2d 814, 817 (1992). Although it thought that "the principle of proportionality should be applied in civil actions that result in harsh penalties," *ibid.*, and that the Government was "exacting too high a penalty in relation to the offense committed," *id.*, at 818, the court felt constrained from holding the forfeiture unconstitutional. It cited this Court's decision in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974), for the proposition that, when the Government is proceeding against property *in rem*, the guilt or innocence of the property's owner "is constitutionally irrelevant." 964 F. 2d, at 817. It then reasoned: "We are constrained to agree with the Ninth Circuit that '[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures.'" *Ibid.*, quoting *United States* v. *Tax Lot 1500*, 861 F. 2d 232, 234 (CA9 1988), cert. denied *sub nom. Jaffee* v. *United States*, 493 U. S. 954 (1989).

We granted certiorari, 506 U. S. 1074 (1993), to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the applicability of the Eighth Amendment to *in rem* civil forfeitures. See *United States* v. *Certain Real Property*, 954 F. 2d 29, 35, 38–39, cert. denied *sub nom. Levin* v. *United States*, 506 U. S. 815 (1992).

II

Austin contends that the Eighth Amendment's Excessive Fines Clause applies to *in rem* civil forfeiture proceedings. See Brief for Petitioner 10, 19, 23. We have had occasion to consider this Clause only once before. In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), we held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages. *Id.*, at 264. The Court's opinion and JUSTICE O'CONNOR's

opinion, concurring in part and dissenting in part, reviewed in some detail the history of the Excessive Fines Clause. See *id.*, at 264–268, 286–297. The Court concluded that both the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government* from abusing its power to punish, see *id.*, at 266–267, and therefore that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government," *id.*, at 268.[3]

We found it unnecessary to decide in *Browning-Ferris* whether the Excessive Fines Clause applies only to criminal cases. *Id.*, at 263. The United States now argues that

> "any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a *criminal* punishment at the time the Eighth Amendment was adopted." Brief for United States 16 (emphasis added).

It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), and *United States* v. *Ward*, 448 U. S. 242 (1980). Brief for United States 26–27. We disagree.

Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person . . . shall be compelled in any criminal case to be a witness

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[3] In *Browning-Ferris*, we left open the question whether the Excessive Fines Clause applies to *qui tam* actions in which a private party brings suit in the name of the United States and shares in the proceeds. See 492 U. S., at 276, n. 21. Because the instant suit was prosecuted by the United States and because Austin's property was forfeited to the United States, we have no occasion to address that question here.

against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions." See generally *Ward*, 448 U. S., at 248.[4] The text of the Eighth Amendment includes no similar limitation. See n. 2, *supra*.

Nor does the history of the Eighth Amendment require such a limitation. JUSTICE O'CONNOR noted in *Browning-Ferris:* "Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment.

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[4] As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to this distinction between provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings, see *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 696 (1965); *Boyd* v. *United States*, 116 U. S. 616, 634 (1886), but that the Sixth Amendment's Confrontation Clause does not, see *United States* v. *Zucker*, 161 U. S. 475, 480–482 (1896). It has also held that the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt, see *In re Winship*, 397 U. S. 358 (1970), does not apply to civil forfeiture proceedings. See *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 271–272 (1878).

The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972); see generally *United States* v. *Halper*, 490 U. S. 435, 446–449 (1989) (Double Jeopardy Clause prohibits second sanction that may not fairly be characterized as remedial). Conversely, the Fifth Amendment's Self-Incrimination Clause, which is textually limited to "criminal case[s]," has been applied in civil forfeiture proceedings, but only where the forfeiture statute had made the culpability of the owner relevant, see *United States* v. *United States Coin & Currency*, 401 U. S. 715, 721–722 (1971), or where the owner faced the possibility of subsequent criminal proceedings, see *Boyd*, 116 U. S., at 634; see also *United States* v. *Ward*, 448 U. S. 242, 253–254 (1980) (discussing *Boyd*).

And, of course, even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963); *Ward*, *supra*.

After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings . . . ." 492 U. S., at 294. Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of § 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." 10 H. C. Jour. 17 (1688). The absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 441 (1689) ("That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted"); see also L. Schwoerer, The Declaration of Rights, 1689, p. 88 (1981) ("But article 10 contains no reference to 'criminal cases' and, thus, would seem to apply . . . to all cases").[5]

The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See *Browning-Ferris*, 492 U. S., at 266–267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether

[5] In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. *Id.*, at 665. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears designed to catalog the misdeeds of James II, see *ibid.*, rather than to define the scope of the substantive rights set out in subsequent sections.

in cash or in kind, "as *punishment* for some offense." *Id.*, at 265 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States* v. *Halper*, 490 U. S. 435, 447–448 (1989). "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.*, at 447. See also *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.[6]

In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U. S., at 448. We turn, then, to consider whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punish-

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[6] For this reason, the United States' reliance on *Kennedy* v. *Mendoza-Martinez* and *United States* v. *Ward* is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. See *Mendoza-Martinez*, 372 U. S., at 167, 184; *Ward*, 448 U. S., at 248. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez* and *Ward*. See, *e. g.*, *United States* v. *Halper*, 490 U. S., at 447. Since in this case we deal only with the question whether the Eighth Amendment's Excessive Fines Clause applies, we need not address the application of those tests.

ment and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today.

III

A

Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. See *Calero-Toledo*, 416 U. S., at 680–683. Each was understood, at least in part, as imposing punishment.

> "At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O. Holmes, The Common Law, c. 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. Blackstone, Commentaries *300. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness." *Id.*, at 680–681 (footnotes omitted).

As Blackstone put it, "such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." 1 W. Blackstone, Commentaries *301.

The second kind of common-law forfeiture fell only upon those convicted of a felony or of treason. "The convicted felon forfeited his chattels to the Crown and his lands es-

cheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo*, 416 U. S., at 682. Such forfeitures were known as forfeitures of estate. See 4 W. Blackstone, at *381. These forfeitures obviously served to punish felons and traitors, see *The Palmyra*, 12 Wheat. 1, 14 (1827), and were justified on the ground that property was a right derived from society which one lost by violating society's laws, see 1 W. Blackstone, at *299; 4 *id.*, at *382.

Third, "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo*, 416 U. S., at 682. The most notable of these were the Navigation Acts of 1660 that required the shipping of most commodities in English vessels. Violations of the Acts resulted in the forfeiture of the illegally carried goods as well as the ship that transported them. See generally L. Harper, English Navigation Laws (1939). The statute was construed so that the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture of the entire ship. See *Mitchell* v. *Torup*, Park. 227, 145 Eng. Rep. 764 (Ex. 1766). Yet Blackstone considered such forfeiture statutes "penal." 3 W. Blackstone, at *261.

In *Calero-Toledo*, we observed that statutory forfeitures were "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." 416 U. S., at 682. Since each of these traditions had a punitive aspect, it is not surprising that forfeiture under the Navigation Acts was justified as a penalty for negligence: "But the Owners of Ships are to take Care what Master they employ, and the Master what Mariners; and here Negligence is plainly imputable to the Master; for he is to report the Cargo of the Ship, and if he had searched and examined the Ship with proper care, according to his Duty, he would have found the Tea . . . and

so might have prevented the Forfeiture." *Mitchell*, Park., at 238, 145 Eng. Rep., at 768.

B

Of England's three kinds of forfeiture, only the third took hold in the United States. "Deodands did not become part of the common-law tradition of this country." *Calero-Toledo*, 416 U. S., at 682. The Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U. S. Const., Art. III, § 3, cl. 2, and the First Congress also abolished forfeiture of estate as a punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. "But '[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes.'" *Calero-Toledo*, 416 U. S., at 683, quoting *C. J. Hendry Co.* v. *Moore*, 318 U. S. 133, 139 (1943).

The First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture. It does not follow from that fact, however, that the First Congress thought such forfeitures to be beyond the purview of the Eighth Amendment. Indeed, examination of those laws suggests that the First Congress viewed forfeiture as punishment. For example, by the Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39, Congress provided that goods could not be unloaded except during the day and with a permit.

> "[A]nd if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same, shall forfeit and pay the sum of four hundred dollars for every offence; shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years; and it shall be the duty of the collector of the district, to

> advertise the names of all such persons in the public gazette of the State in which he resides, within twenty days after each respective conviction. And all goods, wares and merchandise, so landed or discharged, shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and seizure."

Forfeiture of the goods and vessel is listed alongside the other provisions for punishment. It is also of some interest that "forfeit" is the word Congress used for fine. See *ibid.* ("shall forfeit and pay the sum of four hundred dollars for every offence").[7] Other early forfeiture statutes follow the same pattern. See, *e. g.*, Act of Aug. 4, 1790, ch. 34, §§ 13, 22, 27, 28, 1 Stat. 157, 161, 163.

C

Our cases also have recognized that statutory *in rem* forfeiture imposes punishment. In *Peisch* v. *Ware*, 4 Cranch 347 (1808), for example, the Court held that goods removed from the custody of a revenue officer without the payment of duties should not be forfeitable for that reason unless they were removed with the consent of the owner or his agent. Chief Justice Marshall delivered the opinion for a unanimous Court:

> "The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of

[7] Dictionaries of the time confirm that "fine" was understood to include "forfeiture" and vice versa. See 1 T. Sheridan, A General Dictionary of the English Language (1780) (unpaginated) (defining "fine" as: "A mulct, a pecuniary punishment; penalty; forfeit, money paid for any exemption or liberty"); J. Walker, A Critical Pronouncing Dictionary (1791) (unpaginated) (same); 1 Sheridan, *supra* (defining "forfeiture" as: "The act of forfeiting; the thing forfeited, a mulct, a fine"); Walker, *supra* (same); J. Kersey, A New English Dictionary (1702) (unpaginated) (defining "forfeit" as: "default, fine, or penalty").

> the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property." *Id.*, at 364.[8]

The same understanding of forfeiture as punishment runs through our cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. See, *e. g.*, *Calero-Toledo*, 416 U. S., at 683; *J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505 (1921); *Dobbins's Distillery* v. *United States*, 96 U. S. 395 (1878); *Harmony* v. *United States*, 2 How. 210 (1844); *The Palmyra*, 12 Wheat. 1 (1827). In these cases, forfeiture has been justified on two theories—that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.

The fiction that "the thing is primarily considered the offender," *Goldsmith-Grant Co.*, 254 U. S., at 511, has a venerable history in our case law.[9] See *The Palmyra*, 12 Wheat.,

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[8] In *Peisch*, the removal of the goods from the custody of the revenue officer occurred not by theft or robbery, but pursuant to a writ of replevin issued by a state court. See 4 Cranch, at 360. Thus, *Peisch* stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." *Id.*, at 365.

[9] The Government relies heavily on this fiction. See Brief for United States 18. We do not understand the Government to rely separately on the technical distinction between proceedings *in rem* and proceedings *in personam*, but we note that any such reliance would be misplaced. "The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts," *Republic Nat. Bank of Miami* v. *United States*, 506 U. S.

at 14 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing"); *Harmony*, 2 How., at 233 ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner"); *Dobbins's Distillery*, 96 U. S., at 401 ("[T]he offence . . . is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner"). Yet the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent. Thus, in *Goldsmith-Grant Co.*, the Court said that "ascribing to the property a certain personality, a power of complicity and guilt in the wrong," had "some analogy to the law of *deodand*." 254 U. S., at 510. It then quoted Blackstone's explanation of the reason for deodand: that "'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.'" *Id.*, at 510–511, quoting 1 W. Blackstone, at *301.

In none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property. In *The Palmyra*, it did no more than reject the argument that the criminal conviction of the owner was a prerequisite to the forfeiture of his property. See 12 Wheat., at 15 ("[N]o personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature"). In *Harmony*, the owners' claim of "innocence" was limited to the fact that they "never contemplated

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80, 87 (1992), which, particularly in admiralty proceedings, might have lacked *in personam* jurisdiction over the owner of the property. See also *Harmony* v. *United States*, 2 How. 210, 233 (1844). As is discussed in the text, forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature.

or authorized the acts complained of." 2 How., at 230. And in *Dobbins's Distillery*, the Court noted that some responsibility on the part of the owner arose "from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." 96 U. S., at 401. The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner. See, *e. g.*, *Goldsmith-Grant Co.*, 254 U. S., at 512; *Calero-Toledo*, 416 U. S., at 689–690 (noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions").[10] If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense.

The second theory on which the Court has justified the forfeiture of an "innocent" owner's property is that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In *Harmony*, it reasoned that "the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." 2 How., at 234. It repeated this reasoning in *Dobbins's Distillery:*

> "[T]he unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of viola-

[10] Because the forfeiture provisions at issue here exempt "innocent owners," we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner.

> tion as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner." 96 U. S., at 404.

Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent. Thus, in *Calero-Toledo*, we noted that application of forfeiture provisions "to lessors, bailors, or secured creditors who are innocent of any wrongdoing . . . may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." 416 U. S., at 688.[11]

In sum, even though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner. See *Peisch* v. *Ware*, 4 Cranch, at 364 ("[T]he act punishes the owner with a forfeiture of the goods"); *Dobbins's Distillery*, 96 U. S., at 404 ("[T]he acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner"); *Goldsmith-Grant Co.*, 254 U. S., at 511 ("'[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture'"). More recently, we have noted that forfeiture serves "punitive and deterrent purposes," *Calero-Toledo*, 416 U. S., at 686, and "impos[es] an economic penalty," *id.*, at 687. We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.[12]

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[11] In the criminal context, we have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not "'powerless' to prevent or correct the violation." *United States* v. *Park*, 421 U. S. 658, 673 (1975) (corporate officer strictly liable under the Food, Drug, and Cosmetic Act). There is nothing inconsistent, therefore, in viewing forfeiture as punishment even though the forfeiture is occasioned by the acts of a person other than the owner.

[12] The doubts that JUSTICE SCALIA, see *post*, at 625–627, and JUSTICE KENNEDY, see *post*, at 629, express with regard to the historical understanding of forfeiture as punishment appear to stem from a misunder-

IV

We turn next to consider whether forfeitures under 21 U. S. C. §§ 881(a)(4) and (a)(7) are properly considered punishment today. We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment. Unlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an "innocent owner" defense. See § 881(a)(4)(C) ("[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"); § 881(a)(7) ("[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); see also *United States* v. *Parcel of Rumson, N. J., Land*, 507 U. S. 111, 122–123 (1993) (plurality opinion) (noting difference from traditional forfeiture statutes). These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less. In *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), we reasoned that 19 U. S. C. § 1618, which provides that the Secretary of the Treasury is to return the property of those who do not intend to violate the law, demonstrated Congress' intent "to impose a penalty only upon those who are significantly involved in a criminal enterprise." 401 U. S., at 721–722. The inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) reveals a similar congressional intent to punish only those involved in drug trafficking.

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standing of the relevant question. Under *United States* v. *Halper*, 490 U. S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.

Furthermore, Congress has chosen to tie forfeiture directly to the commission of drug offenses. Thus, under § 881(a)(4), a conveyance is forfeitable if it is used or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them. Under § 881(a)(7), real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than one year's imprisonment. See n. 1, *supra.*

The legislative history of § 881 confirms the punitive nature of these provisions. When it added subsection (a)(7) to § 881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S. Rep. No. 98–225, p. 191 (1983).[13] It characterized the forfeiture of real property as "a powerful deterrent." *Id.*, at 195. See also Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes").

The Government argues that §§ 881(a)(4) and (a)(7) are not punitive but, rather, should be considered remedial in two respects. First, they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Brief for United States 32. Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade. *Id.*, at 25, 32.

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[13] Although the United States omits any reference to this legislative history in its brief in the present case, it quoted the same passage with approval in its brief in *United States* v. *Parcel of Rumson, N. J., Land,* 507 U. S. 111 (1993). See Brief for United States, O. T. 1992, No. 91–781, pp. 41–42.

In our view, neither argument withstands scrutiny. Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 699 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." *Ibid.* The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as "contraband."

The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972). But the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any similar argument with respect to those provisions. The Court made this very point in *Ward:* The "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." 448 U. S., at 254.

Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U. S., at 448 (emphasis added). In light of the historical understanding of forfeiture as punishment, the

clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.[14] We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," *Browning-Ferris*, 492 U. S., at 265, and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

V

Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally "excessive." See Brief for Petitioner 46–48. We decline that invitation. Although the Court of Appeals opined that "the government is exacting too high a penalty in relation to the offense committed," 964 F. 2d, at 818, it had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in the inquiry. Prudence dictates that we allow the lower courts to consider that question

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[14] In *Halper*, we focused on whether "the sanction as applied in the individual case serves the goals of punishment." 490 U. S., at 448. In this case, however, it makes sense to focus on §§ 881(a)(4) and (a)(7) as a whole. *Halper* involved a small, fixed-penalty provision, which "in the ordinary case . . . can be said to do no more than make the Government whole." *Id.*, at 449. The value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental. See *Ward*, 448 U. S., at 254. Furthermore, as we have seen, forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence. Finally, it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

in the first instance. See *Yee* v. *Escondido*, 503 U. S. 519, 538 (1992).[15]

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

We recently stated that, at the time the Eighth Amendment was drafted, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 265 (1989). It seems to me that the Court's opinion obscures this clear statement, and needlessly attempts to derive from our sparse case law on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy. I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry.

I

Whether any sort of forfeiture of property may be covered by the Eighth Amendment is not a difficult question. "Forfeiture" and "fine" each appeared as one of many definitions of the other in various 18th-century dictionaries. See *ante*, at 614, n. 7. "Payment," the word we used in *Browning-*

[15] JUSTICE SCALIA suggests that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense. See *post*, at 627–628. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

Ferris as a synonym for fine, certainly includes in-kind assessments. Webster's New International Dictionary 1797 (2d ed. 1950) (defining "payment" as "[t]hat which is paid; the thing given to discharge a debt or an obligation"). Moreover, for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives, see *Browning-Ferris, supra,* at 266–267. Cf. *Harmelin* v. *Michigan,* 501 U. S. 957, 978–979, n. 9 (1991) (opinion of SCALIA, J.). In *Alexander* v. *United States, ante,* at 558, we have today held that an *in personam* criminal forfeiture is an Eighth Amendment "fine."

In order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute "punishment," and it is a much closer question whether statutory *in rem* forfeitures, as opposed to *in personam* forfeitures, meet this requirement. The latter are assessments, whether monetary or in kind, to punish the property owner's criminal conduct, while the former are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law. Statutory *in rem* forfeitures have a long history. See generally *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663, 680–686 (1974). The property to which they apply is not contraband, see the forfeiture Act passed by the First Congress, *ante,* at 613–614, nor is it necessarily property that can only be used for illegal purposes. The theory of *in rem* forfeiture is said to be that the lawful property has committed an offense. See, *e. g., The Palmyra,* 12 Wheat. 1, 14–15 (1827) (forfeiture of vessel for piracy); *Harmony* v. *United States,* 2 How. 210, 233–234 (1844) (forfeiture of vessel, but not cargo, for piracy); *Dobbins's Distillery* v. *United States,* 96 U. S. 395, 400–403 (1878) (forfeiture of distillery and real property for evasion of revenue laws); *J. W. Goldsmith, Jr.-Grant Co.* v. *United*

States, 254 U. S. 505, 510–511 (1921) (forfeiture of goods concealed to avoid taxes).

However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, see *United States* v. *Halper*, 490 U. S. 435, 448 (1989), punitive.* Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property. See *ibid.* Punishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner. This conclusion is supported by Blackstone's observation that even confiscation of a deodand, whose religious origins supposedly did not reflect any punitive motive but only expiation, see Law of Deodands, 34 Law Mag. 188, 189 (1845), came to be explained in part by reference to the owner as well as to the offending property. 1 W. Blackstone, Commentaries *301; accord, Law of Deodands, *supra*, at 190. Our cases have described statutory *in rem* forfeiture as "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Calero-Toledo*, *supra*, at 682.

The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish (in Part III) that such culpability exists in the case of *in rem* forfeitures. In my view, however, the case law is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures. See *ante*,

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*Thus, contrary to the Court's contention, *ante*, at 618–619, n. 12, I agree with it on this point. I do not agree, however, that culpability of the property owner is necessary to establish punitiveness, or that punitiveness "in part" is established by showing that at least in *some* cases the affected property owners are culpable. That is to say, the statutory forfeiture must *always* be at least "partly punitive," or else it is not a fine. See *ante*, at 622, n. 14.

at 616–617, and n. 10; *Goldsmith-Grant*, *supra*, at 512 (reserving question); *Calero-Toledo*, *supra*, at 689–690 (same). A prominent 19th-century treatise explains statutory *in rem* forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner. See 1 J. Bishop, Commentaries on Criminal Law §§816, 824, 825, 833 (7th ed. 1882). If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Well-established common-law distinctions should not be swept away by reliance on bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for *in rem* forfeitures, see *ante*, at 614–618, then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required, see *ante*, at 617, as the Court does again today, see *ante*, at 617, n. 10.

I would have reserved the question without engaging in the misleading discussion of culpability. *Even if* punishment of personal culpability is necessary for a forfeiture to be a fine; and *even if in rem* forfeitures in general do not punish personal culpability; the *in rem* forfeiture in *this* case is a fine. As the Court discusses in Part IV, this statute, in contrast to the traditional *in rem* forfeiture, *requires* that the owner not be innocent—that he have some degree of culpability for the "guilty" property. See also *United States* v. *Parcel of Rumson, N. J., Land*, 507 U. S. 111, 121–123 (1993) (plurality opinion) (contrasting drug forfeiture statute with traditional statutory *in rem* forfeitures). Here, the property must "offend" *and* the owner must not be completely without fault. Nor is there any consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited. That is enough to satisfy the *Browning-Ferris* standard, and to make the entire discussion

in Part III dictum. Statutory forfeitures under § 881(a) are certainly *payment* (in kind) *to a sovereign* as *punishment* for an *offense*.

II

That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King's opponents, see *Browning-Ferris*, 492 U. S., at 266–267, demonstrate that the touchstone is value of the fine in relation to the offense. And in *Alexander* v. *United States*, we indicated that the same is true for *in personam* forfeiture. *Ante*, at 558.

Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section § 881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, consent, or willful blindness," 21 U. S. C. § 881(a)(4)(C), see also § 881(a)(7), or that the property was not so used, see § 881(d) (incorporating 19 U. S. C. § 1615). Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumen-

tality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.

This inquiry for statutory forfeitures has common-law parallels. Even in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death. 1 M. Hale, Pleas of the Crown *419–*422; 1 W. Blackstone, Commentaries *301–*302; Law of Deodands, 34 Law Mag., at 190. Our cases suggest a similar instrumentality inquiry when considering the permissible scope of a statutory forfeiture. Cf. *Goldsmith-Grant*, 254 U. S., at 510, 513; *Harmony*, 2 How., at 235 (ship used for piracy is forfeited, but cargo is not). The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?

I join the Court's opinion in part, and concur in the judgment.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

I am in substantial agreement with Part I of JUSTICE SCALIA's opinion concurring in part and concurring in the judgment. I share JUSTICE SCALIA's belief that Part III of the Court's opinion is quite unnecessary for the decision of the case, fails to support the Court's argument, and seems rather doubtful as well.

In recounting the law's history, we risk anachronism if we attribute to an earlier time an intent to employ legal con-

cepts that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest. For many of the reasons explained by JUSTICE SCALIA, I am not convinced that all *in rem* forfeitures were on account of the owner's blameworthy conduct. Some impositions of *in rem* forfeiture may have been designed either to remove property that was itself causing injury, see, *e. g.*, *Harmony* v. *United States*, 2 How. 210, 233 (1844), or to give the court jurisdiction over an asset that it could control in order to make injured parties whole, see *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. 80, 87 (1992).

At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike JUSTICE SCALIA, see *ante*, at 625, I would also reserve the question whether *in rem* forfeitures always amount to an intended punishment of the owner of forfeited property.

With these observations, I concur in part and concur in the judgment.

Syllabus

SHAW ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 92–357. Argued April 20, 1993—Decided June 28, 1993

To comply with § 5 of the Voting Rights Act of 1965—which prohibits a covered jurisdiction from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization—North Carolina submitted to the Attorney General a congressional reapportionment plan with one majority-black district. The Attorney General objected to the plan on the ground that a second district could have been created to give effect to minority voting strength in the State's south-central to southeastern region. The State's revised plan contained a second majority-black district in the north-central region. The new district stretches approximately 160 miles along Interstate 85 and, for much of its length, is no wider than the I–85 corridor. Appellants, five North Carolina residents, filed this action against appellee state and federal officials, claiming that the State had created an unconstitutional racial gerrymander in violation of, among other things, the Fourteenth Amendment. They alleged that the two districts concentrated a majority of black voters arbitrarily without regard to considerations such as compactness, contiguousness, geographical boundaries, or political subdivisions, in order to create congressional districts along racial lines and to assure the election of two black representatives. The three-judge District Court held that it lacked subject matter jurisdiction over the federal appellees. It also dismissed the complaint against the state appellees, finding, among other things, that, under *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 *(UJO)*, appellants had failed to state an equal protection claim because favoring minority voters was not discriminatory in the constitutional sense and the plan did not lead to proportional underrepresentation of white voters statewide.

Held:

1. Appellants have stated a claim under the Equal Protection Clause by alleging that the reapportionment scheme is so irrational on its face that it can be understood only as an effort to segregate voters into separate districts on the basis of race, and that the separation lacks sufficient justification. Pp. 639–652.

Syllabus

(a) The District Court properly dismissed the claims against the federal appellees. Appellants' racial gerrymandering claims must be examined against the backdrop of this country's long history of racial discrimination in voting. Pp. 639–642.

(b) Classifications of citizens based solely on race are by their nature odious to a free people whose institutions are founded upon the doctrine of equality, because they threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility. Thus, state legislation that expressly distinguishes among citizens on account of race—whether it contains an explicit distinction or is "unexplainable on grounds other than race," *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266—must be narrowly tailored to further a compelling governmental interest. See, *e. g.*, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277–278 (plurality opinion). Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption. See, *e. g.*, *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341. That it may be difficult to determine from the face of a single-member districting plan that it makes such a distinction does not mean that a racial gerrymander, once established, should receive less scrutiny than other legislation classifying citizens by race. By perpetuating stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates—a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. It also sends to elected representatives the message that their primary obligation is to represent only that group's members, rather than their constituency as a whole. Since the holding here makes it unnecessary to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged, the Court expresses no view on whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim. Pp. 642–649.

(c) The classification of citizens by race threatens special harms that are not present in this Court's vote-dilution cases and thus warrants an analysis different from that used in assessing the validity of at-large and multimember gerrymandering schemes. In addition, nothing in the Court's decisions compels the conclusion that racial and political gerrymanders are subject to the same constitutional scrutiny; in fact, this country's long and persistent history of racial discrimination in voting and the Court's Fourteenth Amendment jurisprudence would seem to compel the opposite conclusion. Nor is there any support for the

argument that racial gerrymandering poses no constitutional difficulties when the lines drawn favor the minority, since equal protection analysis is not dependent on the race of those burdened or benefited by a particular classification, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 494 (plurality opinion). Finally, the highly fractured decision in *UJO* does not foreclose the claim recognized here, which is analytically distinct from the vote-dilution claim made there. Pp. 649–652.

2. If, on remand, the allegations of a racial gerrymander are not contradicted, the District Court must determine whether the plan is narrowly tailored to further a compelling governmental interest. A covered jurisdiction's interest in creating majority-minority districts in order to comply with the nonretrogression rule under § 5 of the Voting Rights Act does not give it *carte blanche* to engage in racial gerrymandering. The parties' arguments about whether the plan was necessary to avoid dilution of black voting strength in violation of § 2 of the Act and whether the State's interpretation of § 2 is unconstitutional were not developed below, and the issues remain open for consideration on remand. It is also unnecessary to decide at this stage of the litigation whether the plan advances a state interest distinct from the Act: eradicating the effects of past racial discrimination. Although the State argues that it had a strong basis for concluding that remedial action was warranted, only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the Act's requirements and without regard for sound districting principles. Pp. 653–657.

3. The Court expresses no view on whether appellants successfully could have challenged a district such as that suggested by the Attorney General or whether their complaint stated a claim under other constitutional provisions. Pp. 657–658.

808 F. Supp. 461, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 658. BLACKMUN, J., *post*, p. 676, STEVENS, J., *post*, p. 676, and SOUTER, J., *post*, p. 679, filed dissenting opinions.

Robinson O. Everett argued the cause for appellants. With him on the briefs was *Jeffrey B. Parsons.*

H. Jefferson Powell argued the cause for state appellees. With him on the briefs were *Michael F. Easley*, Attorney General of North Carolina, *Edwin M. Speas, Jr.*, Senior

Deputy Attorney General, and *Norma S. Harrell* and *Tiare B. Smiley*, Special Deputy Attorneys General. *Edwin S. Kneedler* argued the cause for federal appellees. On the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Turner, Thomas G. Hungar*, and *Jessica Dunsay Silver*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional "right" to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. As a result of the 1990 census, North Carolina became entitled to a 12th seat in the United States House of Representatives. The General Assembly enacted a reapportionment plan that included one majority-black congressional district. After the Attorney General of the United States objected to the plan pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, the General Assembly passed new legislation creating a second majority-black district. Appellants allege that the revised plan, which contains district boundary lines of dramatically irregular shape, consti-

*Briefs of *amici curiae* urging reversal were filed for the American Jewish Congress by *Marc D. Stern* and *Lois C. Waldman*; for the Republican National Committee by *Benjamin L. Ginsberg* and *Michael A. Hess*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the Democratic National Committee et al. by *Wayne R. Arden* and *Jeffrey M. Wice*; for the Lawyers' Committee for Civil Rights under Law et al. by *Herbert Wachtell, William H. Brown III, Thomas J. Henderson, Frank R. Parker, Brenda Wright, Nicholas DeB. Katzenbach, Michael R. Cole, Alan E. Kraus, Laughlin McDonald, Kathy Wilde, E. Richard Larson*, and *Dennis Courtland Hayes*; for the NAACP Legal Defense and Educational Fund, Inc., by *Elaine R. Jones, Charles Stephen Ralston*, and *Dayna L. Cunningham*; and for Bolley Johnson et al. by *Donald B. Verrilli, Jr., Scott A. Sinder, Kevin X. Crowley*, and *James A. Peters*.

tutes an unconstitutional racial gerrymander. The question before us is whether appellants have stated a cognizable claim.

I

The voting age population of North Carolina is approximately 78% white, 20% black, and 1% Native American; the remaining 1% is predominantly Asian. App. to Brief for Federal Appellees 16a. The black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties. Brief for Appellants 57. Geographically, the State divides into three regions: the eastern Coastal Plain, the central Piedmont Plateau, and the western mountains. H. Lefler & A. Newsom, The History of a Southern State: North Carolina 18–22 (3d ed. 1973). The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part. O. Gade & H. Stillwell, North Carolina: People and Environments 65–68 (1986). The General Assembly's first redistricting plan contained one majority-black district centered in that area of the State.

Forty of North Carolina's one hundred counties are covered by §5 of the Voting Rights Act of 1965, 42 U. S. C. §1973c, which prohibits a jurisdiction subject to its provisions from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization, *ibid.* The jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the Attorney General. *Ibid.* Because the General Assembly's reapportionment plan affected the covered counties, the parties agree that §5 applied. Tr. of Oral Arg. 14, 27–29. The State chose to submit its plan to the Attorney General for preclearance.

The Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, interposed a formal objection to the General Assembly's plan. The Attorney General specifically objected to the configuration of boundary lines drawn in the south-central to southeastern region of the State. In the Attorney General's view, the General Assembly could have created a second majority-minority district "to give effect to black and Native American voting strength in this area" by using boundary lines "no more irregular than [those] found elsewhere in the proposed plan," but failed to do so for "pretextual reasons." See App. to Brief for Federal Appellees 10a–11a.

Under § 5, the State remained free to seek a declaratory judgment from the District Court for the District of Columbia notwithstanding the Attorney General's objection. It did not do so. Instead, the General Assembly enacted a revised redistricting plan, 1991 N. C. Extra Sess. Laws, ch. 7, that included a second majority-black district. The General Assembly located the second district not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85. See Appendix, *infra*.

The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test," *Shaw* v. *Barr*, 808 F. Supp. 461, 476 (EDNC 1992) (Voorhees, C. J., concurring in part and dissenting in part), and a "bug splattered on a windshield," Wall Street Journal, Feb. 4, 1992, p. A14.

The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in

enough enclaves of black neighborhoods." 808 F. Supp., at 476–477 (Voorhees, C. J., concurring in part and dissenting in part). Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. See Brief for Republican National Committee as *Amicus Curiae* 14–15. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" Washington Post, Apr. 20, 1993, p. A4. The district even has inspired poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee." Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing"?, 14 Cardozo L. Rev. 1237, 1261, n. 96 (1993) (internal quotation marks omitted).

The Attorney General did not object to the General Assembly's revised plan. But numerous North Carolinians did. The North Carolina Republican Party and individual voters brought suit in Federal District Court, alleging that the plan constituted an unconstitutional political gerrymander under *Davis* v. *Bandemer*, 478 U. S. 109 (1986). That claim was dismissed, see *Pope* v. *Blue*, 809 F. Supp. 392 (WDNC), and this Court summarily affirmed, 506 U. S. 801 (1992).

Shortly after the complaint in *Pope* v. *Blue* was filed, appellants instituted the present action in the United States District Court for the Eastern District of North Carolina. Appellants alleged not that the revised plan constituted a political gerrymander, nor that it violated the "one person, one vote" principle, see *Reynolds* v. *Sims*, 377 U. S. 533, 558 (1964), but that the State had created an unconstitutional *racial* gerrymander. Appellants are five residents of Dur-

ham County, North Carolina, all registered to vote in that county. Under the General Assembly's plan, two will vote for congressional representatives in District 12 and three will vote in neighboring District 2. Appellants sued the Governor of North Carolina, the Lieutenant Governor, the Secretary of State, the Speaker of the North Carolina House of Representatives, and members of the North Carolina State Board of Elections (state appellees), together with two federal officials, the Attorney General and the Assistant Attorney General for the Civil Rights Division (federal appellees).

Appellants contended that the General Assembly's revised reapportionment plan violated several provisions of the United States Constitution, including the Fourteenth Amendment. They alleged that the General Assembly deliberately "create[d] two Congressional Districts in which a majority of black voters was concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions" with the purpose "to create Congressional Districts along racial lines" and to assure the election of two black representatives to Congress. App. to Juris. Statement 102a. Appellants sought declaratory and injunctive relief against the state appellees. They sought similar relief against the federal appellees, arguing, alternatively, that the federal appellees had misconstrued the Voting Rights Act or that the Act itself was unconstitutional.

The three-judge District Court granted the federal appellees' motion to dismiss. 808 F. Supp. 461 (EDNC 1992). The court agreed unanimously that it lacked subject matter jurisdiction by reason of § 14(b) of the Voting Rights Act, 42 U. S. C. § 1973*l*(b), which vests the District Court for the District of Columbia with exclusive jurisdiction to issue injunctions against the execution of the Act and to enjoin actions taken by federal officers pursuant thereto. 808 F. Supp., at 466–467; *id.*, at 474 (Voorhees, C. J., concurring

in relevant part). Two judges also concluded that, to the extent appellants challenged the Attorney General's preclearance decisions, their claim was foreclosed by this Court's holding in *Morris* v. *Gressette*, 432 U. S. 491 (1977). 808 F. Supp., at 467.

By a 2-to-1 vote, the District Court also dismissed the complaint against the state appellees. The majority found no support for appellants' contentions that race-based districting is prohibited by Article I, §4, or Article I, §2, of the Constitution, or by the Privileges and Immunities Clause of the Fourteenth Amendment. It deemed appellants' claim under the Fifteenth Amendment essentially subsumed within their related claim under the Equal Protection Clause. 808 F. Supp., at 468–469. That claim, the majority concluded, was barred by *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977) *(UJO)*.

The majority first took judicial notice of a fact omitted from appellants' complaint: that appellants are white. It rejected the argument that race-conscious redistricting to benefit minority voters is *per se* unconstitutional. The majority also rejected appellants' claim that North Carolina's reapportionment plan was impermissible. The majority read *UJO* to stand for the proposition that a redistricting scheme violates white voters' rights only if it is "adopted with the purpose and effect of discriminating against white voters . . . on account of their race." 808 F. Supp., at 472. The purposes of favoring minority voters and complying with the Voting Rights Act are not discriminatory in the constitutional sense, the court reasoned, and majority-minority districts have an impermissibly discriminatory effect only when they unfairly dilute or cancel out white voting strength. Because the State's purpose here was to comply with the Voting Rights Act, and because the General Assembly's plan did not lead to proportional underrepresentation of white voters state-

wide, the majority concluded that appellants had failed to state an equal protection claim. *Id.*, at 472–473.

Chief Judge Voorhees agreed that race-conscious redistricting is not *per se* unconstitutional but dissented from the rest of the majority's equal protection analysis. He read JUSTICE WHITE's opinion in *UJO* to authorize race-based reapportionment only when the State employs traditional districting principles such as compactness and contiguity. 808 F. Supp., at 475–477 (opinion concurring in part and dissenting in part). North Carolina's failure to respect these principles, in Judge Voorhees' view, "augur[ed] a constitutionally suspect, and potentially unlawful, intent" sufficient to defeat the state appellees' motion to dismiss. *Id.*, at 477.

We noted probable jurisdiction. 506 U. S. 1019 (1992).

II

A

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ." *Reynolds* v. *Sims*, 377 U. S., at 555. For much of our Nation's history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would be "denied or abridged . . . by any State on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1.

But "[a] number of states . . . refused to take no for an answer and continued to circumvent the fifteenth amendment's prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of pervasive racial discrimination." Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose Vs. Results Approach from the Voting Rights Act, 69 Va. L. Rev. 633, 637 (1983). Ostensibly race-neutral devices such as literacy tests with "grandfather" clauses and "good character" provisos were devised to deprive black voters of the franchise.

Another of the weapons in the States' arsenal was the racial gerrymander—"the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Bandemer*, 478 U. S., at 164 (Powell, J., concurring in part and dissenting in part) (internal quotation marks omitted). In the 1870's, for example, opponents of Reconstruction in Mississippi "concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." E. Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, p. 590 (1988). Some 90 years later, Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in a manner that was alleged to exclude black voters, and only black voters, from the city limits. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340 (1960).

Alabama's exercise in geometry was but one example of the racial discrimination in voting that persisted in parts of this country nearly a century after ratification of the Fifteenth Amendment. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309–313 (1966). In some States, registration of eligible black voters ran 50% behind that of whites. *Id.*, at 313. Congress enacted the Voting Rights Act of 1965 as a dramatic and severe response to the situation. The Act proved immediately successful in ensuring racial minorities access to the voting booth; by the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%. A. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 44 (1987).

But it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. Drawing on the "one person, one vote" principle, this Court recognized that "[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."

Allen v. *State Bd. of Elections*, 393 U. S. 544, 569 (1969) (emphasis added). Where members of a racial minority group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters' ability, as a group, "to elect the candidate of their choice." *Ibid.* Accordingly, the Court held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 616–617 (1982); *White* v. *Regester*, 412 U. S. 755, 765–766 (1973). Congress, too, responded to the problem of vote dilution. In 1982, it amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent. 42 U. S. C. § 1973; see *Thornburg* v. *Gingles*, 478 U. S. 30 (1986) (applying amended § 2 to vote-dilution claim involving multimember districts); see also *Voinovich* v. *Quilter*, 507 U. S. 146, 155 (1993) (single-member districts).

B

It is against this background that we confront the questions presented here. In our view, the District Court properly dismissed appellants' claims against the federal appellees. Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering. That argument strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.

An understanding of the nature of appellants' claim is critical to our resolution of the case. In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind"

electoral process. Complaint ¶ 29, App. to Juris. Statement 89a–90a; see also Brief for Appellants 31–32.

Despite their invocation of the ideal of a "color-blind" Constitution, see *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting), appellants appear to concede that race-conscious redistricting is not always unconstitutional. See Tr. of Oral Arg. 16–19. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause. See Fed. Rule Civ. Proc. 12(b)(6).

III

A

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition.

No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979). Accord, *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 485 (1982). Express racial classifications are immediately suspect because, "[a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are 'benign' or 'remedial' and what classi-

fications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion); *id.*, at 520 (SCALIA, J., concurring in judgment); see also *UJO*, 430 U. S., at 172 (Brennan, J., concurring in part) ("[A] purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries").

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Accord, *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967). They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. *Croson*, *supra*, at 493 (plurality opinion); *UJO*, *supra*, at 173 (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs"). Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. See, *e. g.*, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277–278 (1986) (plurality opinion); *id.*, at 285 (O'CONNOR, J., concurring in part and concurring in judgment).

These principles apply not only to legislation that contains explicit racial distinctions, but also to those "rare" statutes that, although race neutral, are, on their face, "unexplainable on grounds other than race." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). As we explained in *Feeney*:

> "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only

upon an extraordinary justification. *Brown* v. *Board of Education*, 347 U. S. 483; *McLaughlin* v. *Florida*, 379 U. S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Guinn* v. *United States*, 238 U. S. 347; cf. *Lane* v. *Wilson*, 307 U. S. 268; *Gomillion* v. *Lightfoot*, 364 U. S. 339." 442 U. S., at 272.

B

Appellants contend that redistricting legislation that is so bizarre on its face that it is "unexplainable on grounds other than race," *Arlington Heights*, *supra*, at 266, demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.

In *Guinn* v. *United States*, 238 U. S. 347 (1915), the Court invalidated under the Fifteenth Amendment a statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote "on [or prior to] January 1, 1866." *Id.*, at 357 (internal quotation marks omitted). The determinative consideration for the Court was that the law, though ostensibly race neutral, on its face "embod[ied] no exercise of judgment and rest[ed] upon no discernible reason" other than to circumvent the prohibitions of the Fifteenth Amendment. *Id.*, at 363. In other words, the statute was invalid because, on its face, it could not be explained on grounds other than race.

The Court applied the same reasoning to the "uncouth twenty-eight-sided" municipal boundary line at issue in *Gomillion*. Although the statute that redrew the city limits of Tuskegee was race neutral on its face, plaintiffs alleged that its effect was impermissibly to remove from the city virtually all black voters and no white voters. The Court reasoned:

> "If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U. S., at 341.

The majority resolved the case under the Fifteenth Amendment. *Id.*, at 342–348. Justice Whittaker, however, concluded that the "unlawful segregation of races of citizens" into different voting districts was cognizable under the Equal Protection Clause. *Id.*, at 349 (concurring opinion). This Court's subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whittaker's view. See, *e. g.*, *Feeney*, *supra*, at 272; *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971); see also *Mobile* v. *Bolden*, 446 U. S. 55, 86 (1980) (STEVENS, J., concurring in judgment) (*Gomillion*'s holding "is compelled by the Equal Protection Clause"). *Gomillion* thus supports appellants' contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.

The Court extended the reasoning of *Gomillion* to congressional districting in *Wright* v. *Rockefeller*, 376 U. S. 52 (1964). At issue in *Wright* were four districts contained in a New York apportionment statute. The plaintiffs alleged that the statute excluded nonwhites from one district and concentrated them in the other three. *Id.*, at 53–54. Every Member of the Court assumed that the plaintiffs' allegation that the statute "segregate[d] eligible voters by race and place of origin" stated a constitutional claim. *Id.*, at 56 (internal quotation marks omitted); *id.*, at 58 (Harlan, J., concurring); *id.*, at 59–62 (Douglas, J., dissenting). The Justices disagreed only as to whether the plaintiffs had carried their burden of proof at trial. The dissenters thought the unusual

shape of the district lines could "be explained only in racial terms." *Id.*, at 59. The majority, however, accepted the District Court's finding that the plaintiffs had failed to establish that the districts were in fact drawn on racial lines. Although the boundary lines were somewhat irregular, the majority reasoned, they were not so bizarre as to permit of no other conclusion. Indeed, because most of the nonwhite voters lived together in one area, it would have been difficult to construct voting districts without concentrations of nonwhite voters. *Id.*, at 56–58.

Wright illustrates the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race. A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. As *Wright* demonstrates, when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions. See *Reynolds*, 377 U. S., at 578 (recognizing these as legitimate state interests).

The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be

understood as anything other than an effort to "segregat[e] . . . voters" on the basis of race. *Gomillion, supra,* at 341. *Gomillion,* in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions. We emphasize that these criteria are important not because they are constitutionally required—they are not, cf. *Gaffney* v. *Cummings,* 412 U. S. 735, 752, n. 18 (1973)—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines. Cf. *Karcher* v. *Daggett,* 462 U. S. 725, 755 (1983) (STEVENS, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation" (footnotes omitted)).

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. See, *e. g., Holland* v. *Illinois,* 493 U. S. 474, 484, n. 2 (1990) ("[A] prosecutor's assumption that a black juror may be presumed to be partial simply because he is black . . . violates the Equal Protection

Clause" (internal quotation marks omitted)); see also *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 630–631 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy. As Justice Douglas explained in his dissent in *Wright* v. *Rockefeller* nearly 30 years ago:

> "Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. . . .
>
> . . . . .
>
> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with

the democratic ideal, it should find no footing here." 376 U. S., at 66–67.

For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more," always gives rise to an equal protection claim. *Post*, at 668 (WHITE, J., dissenting). We hold only that, on the facts of this case, appellants have stated a claim sufficient to defeat the state appellees' motion to dismiss.

C

The dissenters consider the circumstances of this case "functionally indistinguishable" from multimember districting and at-large voting systems, which are loosely described as "other varieties of gerrymandering." *Post*, at 671 (WHITE, J., dissenting); see also *post*, at 684 (SOUTER, J., dissenting). We have considered the constitutionality of these practices in other Fourteenth Amendment cases and have required plaintiffs to demonstrate that the challenged practice has the purpose and effect of diluting a racial group's voting strength. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613 (1982) (at-large system); *Mobile* v. *Bolden*, 446 U. S. 55 (1980) (same); *White* v. *Regester*, 412 U. S. 755 (1973) (multimember districts); *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971) (same); see also *supra*, at 640–641. At-large and multimember schemes, however, do not classify voters on the basis of race. Classifying citizens by race, as we have said, threatens spe-

cial harms that are not present in our vote-dilution cases. It therefore warrants different analysis.

JUSTICE SOUTER apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. See *post*, at 684 (dissenting opinion). As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. See *supra*, at 647–649. JUSTICE SOUTER does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

The dissenters make two other arguments that cannot be reconciled with our precedents. First, they suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. See *post*, at 679 (opinion of STEVENS, J.); see also *post*, at 662–663 (opinion of WHITE, J.). This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. See *Davis* v. *Bandemer*, 478 U. S., at 118–127. But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, see *supra*, at 642–644—would seem to compel the opposite conclusion.

Second, JUSTICE STEVENS argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the minority, rather than the majority. See *post*, at 678 (dissenting opinion). We have made clear, however, that equal protection analysis "is not dependent

on the race of those burdened or benefited by a particular classification." *Croson*, 488 U. S., at 494 (plurality opinion); see also *id.*, at 520 (SCALIA, J., concurring in judgment). Accord, *Wygant*, 476 U. S., at 273 (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally. See *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

Finally, nothing in the Court's highly fractured decision in *UJO*—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls, see *post*, at 664–667 (opinion of WHITE, J.); *post*, at 684, and n. 6 (opinion of SOUTER, J.)—forecloses the claim we recognize today. *UJO* concerned New York's revision of a reapportionment plan to include additional majority-minority districts in response to the Attorney General's denial of administrative preclearance under § 5. In that regard, it closely resembles the present case. But the cases are critically different in another way. The plaintiffs in *UJO*—members of a Hasidic community split between two districts under New York's revised redistricting plan—did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim. Three Justices approved the New York statute, in part, precisely because it adhered to traditional districting principles:

> "[W]e think it . . . permissible for a State, *employing sound districting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority."

430 U. S., at 168 (opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.) (emphasis added).

As a majority of the Justices construed the complaint, the *UJO* plaintiffs made a different claim: that the New York plan impermissibly "diluted" their voting strength. Five of the eight Justices who participated in the decision resolved the case under the framework the Court previously had adopted for vote-dilution cases. Three Justices rejected the plaintiffs' claim on the grounds that the New York statute "represented no racial slur or stigma with respect to whites or any other race" and left white voters with better than proportional representation. *Id.*, at 165–166. Two others concluded that the statute did not minimize or cancel out a minority group's voting strength and that the State's intent to comply with the Voting Rights Act, as interpreted by the Department of Justice, "foreclose[d] any finding that [the State] acted with the invidious purpose of discriminating against white voters." *Id.*, at 180 (Stewart, J., joined by Powell, J., concurring in judgment).

The District Court below relied on these portions of *UJO* to reject appellants' claim. See 808 F. Supp., at 472–473. In our view, the court used the wrong analysis. *UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality. *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. But it did not purport to overrule *Gomillion* or *Wright*. Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification. Because appellants here stated such a claim, the District Court erred in dismissing their complaint.

IV

JUSTICE SOUTER contends that exacting scrutiny of racial gerrymanders under the Fourteenth Amendment is inappropriate because reapportionment "nearly always require[s] some consideration of race for legitimate reasons." *Post*, at 680 (dissenting opinion). "As long as members of racial groups have [a] commonality of interest" and "racial bloc voting takes place," he argues, "legislators will have to take race into account" in order to comply with the Voting Rights Act. *Ibid.* JUSTICE SOUTER's reasoning is flawed.

Earlier this Term, we unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. See *Growe* v. *Emison*, 507 U. S. 25, 40–41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy"). That racial bloc voting or minority political cohesion may be found to exist in *some* cases, of course, is no reason to treat *all* racial gerrymanders differently from other kinds of racial classification. JUSTICE SOUTER apparently views racial gerrymandering of the type presented here as a special category of "benign" racial discrimination that should be subject to relaxed judicial review. Cf. *post*, at 684–685 (dissenting opinion). As we have said, however, the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is "benign." See *supra*, at 642–643. Thus, if appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny. We therefore consider what that level of scrutiny requires in the reapportionment context.

The state appellees suggest that a covered jurisdiction may have a compelling interest in creating majority-minority

districts in order to comply with the Voting Rights Act. The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied. But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires.

For example, on remand North Carolina might claim that it adopted the revised plan in order to comply with the § 5 "nonretrogression" principle. Under that principle, a proposed voting change cannot be precleared if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In *Beer*, we held that a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities. *Id.*, at 141–142; see also *Richmond* v. *United States*, 422 U. S. 358, 370–371 (1975) (annexation that reduces percentage of blacks in population satisfies § 5 where post-annexation districts "fairly reflect" current black voting strength).

Although the Court concluded that the redistricting scheme at issue in *Beer* was nonretrogressive, it did not hold that the plan, for that reason, was immune from constitutional challenge. The Court expressly declined to reach that question. See 425 U. S., at 142, n. 14. Indeed, the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional. See 42 U. S. C. § 1973c (neither a declaratory judgment by the District Court for the District of Columbia nor preclearance by the Attorney General "shall bar a subsequent action to enjoin enforcement" of new voting practice); *Allen*, 393 U. S., at 549–550 (after preclearance, "private parties may enjoin the enforcement of the new enactment . . . in traditional suits attacking its constitutionality"). Thus,

we do not read *Beer* or any of our other §5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. Our conclusion is supported by the plurality opinion in *UJO*, in which four Justices determined that New York's creation of additional majority-minority districts was constitutional because the plaintiffs had failed to demonstrate that the State "did more than the Attorney General was authorized to *require* it to do under the nonretrogression principle of *Beer*." 430 U. S., at 162–163 (opinion of WHITE, J., joined by Brennan, BLACKMUN, and STEVENS, JJ.) (emphasis added).

Before us, the state appellees contend that the General Assembly's revised plan was necessary not to prevent retrogression, but to avoid dilution of black voting strength in violation of §2, as construed in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986). In *Gingles* the Court considered a multimember redistricting plan for the North Carolina State Legislature. The Court held that members of a racial minority group claiming §2 vote dilution through the use of multimember districts must prove three threshold conditions: that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," that the minority group is "politically cohesive," and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*, at 50–51. We have indicated that similar preconditions apply in §2 challenges to single-member districts. See *Voinovich* v. *Quilter*, 507 U. S., at 157–158; *Growe* v. *Emison*, 507 U. S., at 40.

Appellants maintain that the General Assembly's revised plan could not have been required by §2. They contend that the State's black population is too dispersed to support two geographically compact majority-black districts, as the bi-

zarre shape of District 12 demonstrates, and that there is no evidence of black political cohesion. They also contend that recent black electoral successes demonstrate the willingness of white voters in North Carolina to vote for black candidates. Appellants point out that blacks currently hold the positions of State Auditor, Speaker of the North Carolina House of Representatives, and chair of the North Carolina State Board of Elections. They also point out that in 1990 a black candidate defeated a white opponent in the Democratic Party runoff for a United States Senate seat before being defeated narrowly by the Republican incumbent in the general election. Appellants further argue that if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional. These arguments were not developed below, and the issues remain open for consideration on remand.

The state appellees alternatively argue that the General Assembly's plan advanced a compelling interest entirely distinct from the Voting Rights Act. We previously have recognized a significant state interest in eradicating the effects of past racial discrimination. See, *e. g.*, *Croson*, 488 U. S., at 491–493 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE, J.); *id.*, at 518 (KENNEDY, J., concurring in part and concurring in judgment); *Wygant*, 476 U. S., at 280–282 (plurality opinion); *id.*, at 286 (O'CONNOR, J., concurring in part and concurring in judgment). But the State must have a "'strong basis in evidence for [concluding] that remedial action [is] necessary.'" *Croson*, *supra*, at 500 (quoting *Wygant*, *supra*, at 277 (plurality opinion)).

The state appellees submit that two pieces of evidence gave the General Assembly a strong basis for believing that remedial action was warranted here: the Attorney General's imposition of the § 5 preclearance requirement on 40 North Carolina counties, and the *Gingles* District Court's findings of a long history of official racial discrimination in North Carolina's political system and of pervasive racial bloc voting.

The state appellees assert that the deliberate creation of majority-minority districts is the most precise way—indeed the only effective way—to overcome the effects of racially polarized voting. This question also need not be decided at this stage of the litigation. We note, however, that only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act. And those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles," and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority." 430 U. S., at 167–168 (opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.).

V

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

In this case, the Attorney General suggested that North Carolina could have created a reasonably compact second majority-minority district in the south-central to southeastern part of the State. We express no view as to whether appellants successfully could have challenged such a district under the Fourteenth Amendment. We also do not decide

whether appellants' complaint stated a claim under constitutional provisions other than the Fourteenth Amendment. Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification. If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest. Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Appendix containing map of North Carolina Congressional Plan follows this page.]

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The facts of this case mirror those presented in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977) *(UJO)*, where the Court rejected a claim that creation of a majority-minority district violated the Constitution, either as a *per se* matter or in light of the circumstances leading to the creation of such a district. Of particular relevance, five of the Justices reasoned that members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled, see *id.*, at 165–168 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.), or that such had been the State's intent, see *id.*, at 179–180 (Stewart, J., joined by Powell, J., concurring in judgment). Accordingly, they held that plaintiffs were not entitled to relief under the Constitution's

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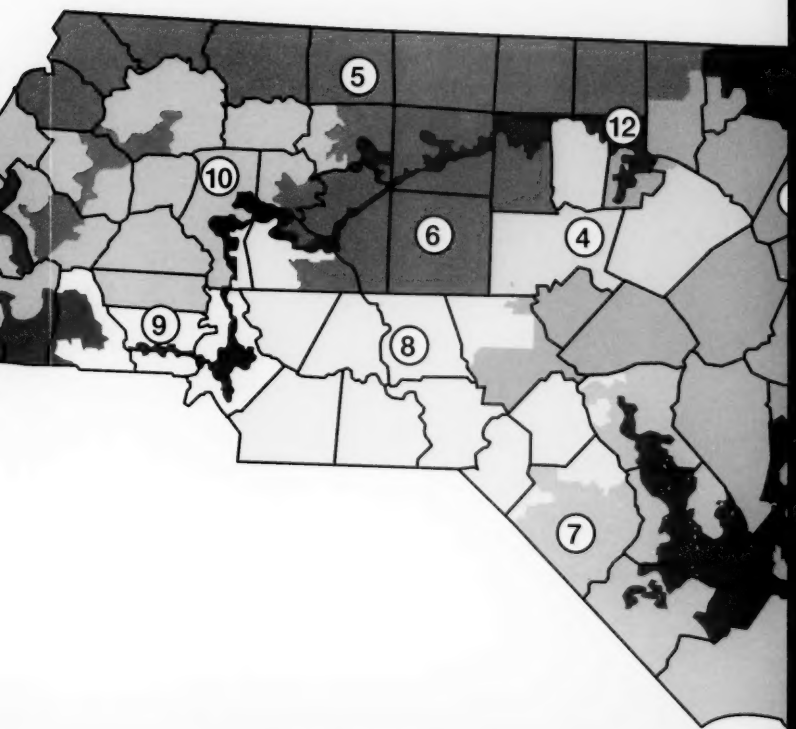

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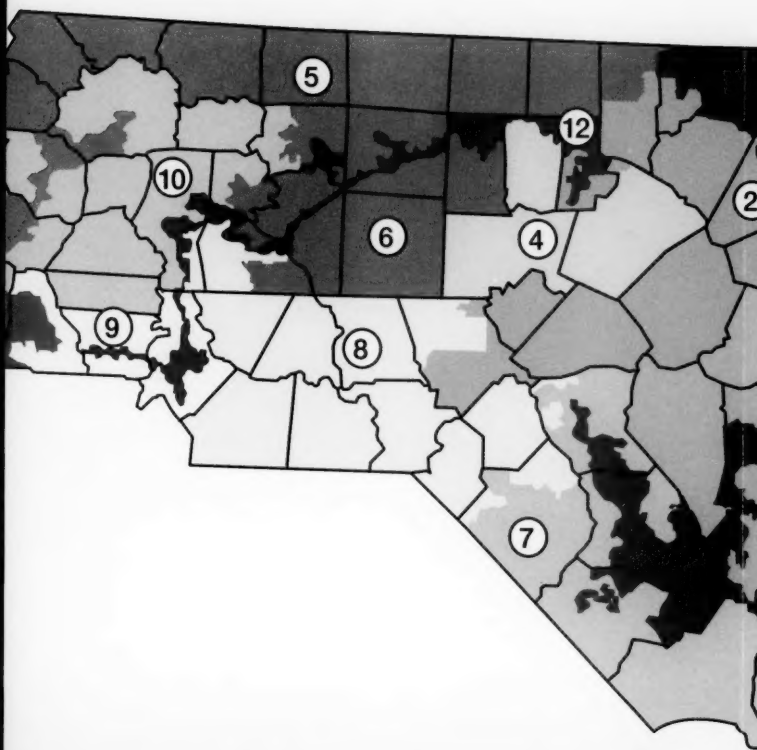

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Equal Protection Clause. On the same reasoning, I would affirm the District Court's dismissal of appellants' claim in this instance.

The Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action. Because the holding is limited to such anomalous circumstances, *ante*, at 649, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities. Nonetheless, the notion that North Carolina's plan, under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its *first* black representatives since Reconstruction to the United States Congress, might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles. Seeing no good reason to engage in either, I dissent.

I

A

The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury. To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. See, *e. g.*, *Guinn* v. *United States*, 238 U. S. 347 (1915). Plainly, this variety is not implicated by appellants' allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various groups," *Mobile* v. *Bolden*, 446 U. S. 55, 83 (1980) (STEVENS, J., concurring in judgment), in violation of the Equal Protection Clause. As for this latter category, we

have insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.[1] Although this severe burden has limited the number of successful suits, it was adopted for sound reasons.

The central explanation has to do with the nature of the redistricting process. As the majority recognizes, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Ante*, at 646 (emphasis in original). "Being aware," in this context, is shorthand for "taking into account," and it hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like.

> "[L]ike bloc-voting by race, [the racial composition of geographic area] too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer* v. *United States*, 425 U. S. 130, 144 (1976) (WHITE, J., dissenting).

As we have said, "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Gaffney* v. *Cummings*, 412

[1] It has been argued that the required showing of discriminatory effect should be lessened once a plaintiff successfully demonstrates intentional discrimination. See *Garza* v. *County of Los Angeles*, 918 F. 2d 763, 771 (CA9 1990). Although I would leave this question for another day, I would note that even then courts have insisted on "*some* showing of injury . . . to assure that the district court can impose a meaningful remedy." *Ibid.*

U. S. 735, 753 (1973); see also *Mobile* v. *Bolden*, *supra*, at 86–87 (STEVENS, J., concurring in judgment). Because extirpating such considerations from the redistricting process is unrealistic, the Court has not invalidated all plans that consciously use race, but rather has looked at their impact.

Redistricting plans also reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group's power to affect the political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim. See, *e. g.*, *White* v. *Regester*, 412 U. S. 755, 765–766 (1973); *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–155 (1971).

With these considerations in mind, we have limited such claims by insisting upon a showing that "the political processes . . . were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester*, *supra*, at 766. Indeed, as a brief survey of decisions illustrates, the Court's gerrymandering cases all carry this theme—that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned.

In *Whitcomb* v. *Chavis*, 403 U. S., at 149, we searched in vain for evidence that black voters "had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice." More generally, we remarked:

> "The mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its

> own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system." *Id.*, at 154–155.

Again, in *White* v. *Regester*, *supra*, the same criteria were used to uphold the District Court's finding that a redistricting plan was unconstitutional. The "historic and present condition" of the Mexican-American community, *id.*, at 767, a status of cultural and economic marginality, *id.*, at 768, as well as the legislature's unresponsiveness to the group's interests, *id.*, at 768–769, justified the conclusion that Mexican-Americans were "'effectively removed from the political processes,'" and "invidiously excluded . . . from effective participation in political life," *id.*, at 769. Other decisions of this Court adhere to the same standards. See *Rogers* v. *Lodge*, 458 U. S. 613, 624–626 (1982); *Chapman* v. *Meier*, 420 U. S. 1, 17 (1975) (requiring proof that "the group has been denied access to the political process equal to the access of other groups").[2]

I summed up my views on this matter in the plurality opinion in *Davis* v. *Bandemer*, 478 U. S. 109 (1986).[3] Because districting inevitably is the expression of interest group politics, and because "the power to influence the political process is not limited to winning elections," *id.*, at 132,

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[2] It should be noted that § 2 of the Voting Rights Act forbids any State to impose specified devices or procedures that result in a denial or abridgment of the right to vote on account of race or color. Section 2 also provides that a violation of that prohibition "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

[3] Although *Davis* involved political groups, the principles were expressly drawn from the Court's racial gerrymandering cases. See 478 U. S., at 131, n. 12 (plurality opinion).

the question in gerrymandering cases is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process," *id.*, at 132–133. Thus, "an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively.*" *Id.*, at 133 (emphasis added). By this, I meant that the group must exhibit "strong indicia of lack of political power and the denial of fair representation," so that it could be said that it has "essentially been shut out of the political process." *Id.*, at 139. In short, even assuming that racial (or political) factors were considered in the drawing of district boundaries, a showing of discriminatory effects is a "threshold requirement" in the absence of which there is no equal protection violation, *id.*, at 143, and no need to "reach the question of the state interests . . . served by the particular districts," *id.*, at 142.[4]

To distinguish a claim that alleges that the redistricting scheme has discriminatory intent and effect from one that does not has nothing to do with dividing racial classifications between the "benign" and the malicious—an enterprise which, as the majority notes, the Court has treated with skepticism. See *ante*, at 642–643. Rather, the issue is whether the classification based on race discriminates

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[4] Although disagreeing with the Court's holding in *Davis* that claims of political gerrymandering are justiciable, see *id.*, at 144 (O'CONNOR, J., concurring in judgment), the author of today's opinion expressed views on racial gerrymandering quite similar to my own:

"[W]here a racial minority group is characterized by 'the traditional indicia of suspectness' and is vulnerable to exclusion from the political process . . . individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. . . . Even so, *the individual's right is infringed only if the racial minority can prove that it has 'essentially been shut out of the political process.'*" *Id.*, at 151–152 (emphasis added). As explained below, that position cannot be squared with the one taken by the majority in this case.

against *anyone* by denying equal access to the political process. Even Members of the Court least inclined to approve of race-based remedial measures have acknowledged the significance of this factor. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 524–525, n. 3 (1980) (Stewart, J., dissenting) ("No person in *[UJO]* was deprived of his electoral franchise"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 304–305 (1978) (Powell, J.) ("*United Jewish Organizations* . . . properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, *without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process*") (emphasis added).

B

The most compelling evidence of the Court's position prior to this day, for it is most directly on point, is *UJO*, 430 U. S. 144 (1977). The Court characterizes the decision as "highly fractured," *ante*, at 651, but that should not detract attention from the rejection by a majority in *UJO* of the claim that the State's intentional creation of majority-minority districts transgressed constitutional norms. As stated above, five Justices were of the view that, absent any contention that the proposed plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength, the Fourteenth Amendment was not implicated. Writing for three Members of the Court, I justified this conclusion as follows:

> "It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the

plan did not minimize or unfairly cancel out white voting strength." 430 U. S., at 165.

In a similar vein, Justice Stewart was joined by Justice Powell in stating:

> "The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. See *Gomillion* v. *Lightfoot*, 364 U. S. 339. They have made no showing that the redistricting scheme was employed as part of a 'contrivance to segregate'; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.*, at 179 (opinion concurring in judgment) (some citations omitted).

Under either formulation, it is irrefutable that appellants in this proceeding likewise have failed to state a claim. As was the case in New York, a number of North Carolina's political subdivisions have interfered with black citizens' meaningful exercise of the franchise and are therefore subject to §§ 4 and 5 of the Voting Rights Act. Cf. *UJO*, *supra*, at 148. In other words, North Carolina was found by Congress to have "'resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees'" and therefore "would be likely to engage in 'similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.'" *McCain* v. *Lybrand*, 465 U. S. 236, 245 (1984) (quoting *South Carolina* v. *Katzenbach*, 383 U. S. 301, 334, 335 (1966)).[5] Like New York, North Carolina failed to prove to

[5] In *Thornburg* v. *Gingles*, 478 U. S. 30, 38 (1986), we noted the District Court's findings that "North Carolina had officially discriminated against

the Attorney General's satisfaction that its proposed redistricting had neither the purpose nor the effect of abridging the right to vote on account of race or color. Cf. *UJO, supra,* at 150. The Attorney General's interposition of a § 5 objection "properly is viewed" as "an administrative finding of discrimination" against a racial minority. *Regents of Univ. of Cal.* v. *Bakke, supra,* at 305 (opinion of Powell, J.). Finally, like New York, North Carolina reacted by modifying its plan and creating additional majority-minority districts. Cf. *UJO, supra,* at 151–152.

In light of this background, it strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by "impair[ing] or burden[ing their] opportunity . . . to participate in the political process." *Id.*, at 179 (Stewart, J., concurring in judgment). The State has made no mystery of its intent, which was to respond to the Attorney General's objections, see Brief for State Appellees 13–14, by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases—*i. e.*, an intent to aggravate "the unequal distribution of electoral power." *Post,* at 678 (STEVENS, J., dissenting). But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76% of the total population and 79% of the voting age population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83%) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minor-

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its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing a poll tax [and] a literacy test."

ity voters—surely they cannot complain of discriminatory treatment.[6]

II

The majority attempts to distinguish *UJO* by imagining a heretofore unknown type of constitutional claim. In its words, "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. . . . Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Ante*, at 652. There is no support for this distinction in *UJO*, and no authority in the cases relied on by the Court either. More importantly, the majority's submission does not withstand analysis. The logic of its theory appears to be that race-conscious redistricting that "segregates" by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way. The distinction is without foundation.

A

The essence of the majority's argument is that *UJO* dealt with a claim of vote dilution—which required a specific showing of harm—and that cases such as *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), dealt with claims of racial segregation—which did not. I read these decisions quite differently. Petitioners'

[6] This is not to say that a group that has been afforded roughly proportional representation *never* can make out a claim of unconstitutional discrimination. Such districting might have both the intent and effect of "packing" members of the group so as to deprive them of any influence in other districts. Again, however, the equal protection inquiry should look at the group's overall influence over, and treatment by, elected representatives and the political process as a whole.

claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines.*" 430 U. S., at 155 (plurality opinion) (emphasis added). They also stated: "'Our argument is . . . that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.'" *Id.*, at 154, n. 14 (quoting Brief for Petitioners, O. T. 1976, No. 75–104, p. 6, n. 6) (emphasis in original). Nor was it ever in doubt that "the State deliberately used race in a purposeful manner." 430 U. S., at 165. In other words, the "analytically distinct claim" the majority discovers today was in plain view and did not carry the day for petitioners. The fact that a demonstration of discriminatory effect was required in that case was not a function of the kind of claim that was made. It was a function of the type of injury upon which the Court insisted.

Gomillion is consistent with this view. To begin, the Court's reliance on that case as the font of its novel type of claim is curious. Justice Frankfurter characterized the complaint as alleging a deprivation of the right to vote in violation of the *Fifteenth* Amendment. See 364 U. S., at 341, 346. Regardless whether that description was accurate, see *ante*, at 645, it seriously deflates the precedential value which the majority seeks to ascribe to *Gomillion:* As I see it, the case cannot stand for the proposition that the intentional creation of majority-minority districts, without more, gives rise to an equal protection challenge under the Fourteenth Amendment. But even recast as a Fourteenth Amendment case, *Gomillion* does not assist the majority, for its focus was on the alleged *effect* of the city's action, which was to exclude black voters from the municipality of Tuskegee. As the Court noted, the "inevitable effect of this redefinition of Tuskegee's boundaries" was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee." 364 U. S., at 341. Even Justice Whit-

taker's concurrence appears to be premised on the notion that black citizens were being "fenc[ed] out" of municipal benefits. *Id.*, at 349. Subsequent decisions of this Court have similarly interpreted *Gomillion* as turning on the unconstitutional effect of the legislation. See *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971); *United States* v. *O'Brien*, 391 U. S. 367, 385 (1968). In *Gomillion*, in short, the group that formed the majority at the state level purportedly set out to manipulate city boundaries in order to remove members of the minority, thereby denying them valuable municipal services. No analogous purpose or effect has been alleged in this case.

The only other case invoked by the majority is *Wright* v. *Rockefeller*, *supra*. *Wright* involved a challenge to a legislative plan that created four districts. In the 17th, 19th, and 20th Districts, whites constituted respectively 94.9%, 71.5%, and 72.5% of the population. 86.3% of the population in the 18th District was classified as nonwhite or Puerto Rican. See *Wright* v. *Rockefeller*, 211 F. Supp. 460, 472 (SDNY 1962) (Murphy, J., dissenting); 376 U. S., at 54. The plaintiffs alleged that the plan was drawn with the intent to segregate voters on the basis of race, in violation of the Fourteenth and Fifteenth Amendments. *Id.*, at 53–54. The Court affirmed the District Court's dismissal of the complaint on the ground that plaintiffs had not met their burden of proving discriminatory intent. See *id.*, at 55, 58. I fail to see how a decision based on a failure to establish discriminatory *intent* can support the inference that it is unnecessary to prove discriminatory *effect*.

Wright is relevant only to the extent that it illustrates a proposition with which I have no problem: that a complaint stating that a plan has carved out districts on the basis of race *can*, under certain circumstances, state a claim under the Fourteenth Amendment. To that end, however, there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan

depends on these twin elements. In *Wright*, for example, the facts might have supported the contention that the districts were intended to, and did in fact, shield the 17th District from any minority influence and "pack" black and Puerto Rican voters in the 18th, thereby invidiously minimizing their voting strength. In other words, the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of "packing"—*i. e.*, overconcentration of minority voters. In the present case, the facts could sustain no such allegation.

B

Lacking support in any of the Court's precedents, the majority's novel type of claim also makes no sense. As I understand the theory that is put forth, a redistricting plan that uses race to "segregate" voters by drawing "uncouth" lines is harmful in a way that a plan that uses race to distribute voters differently is not, for the former "bears an uncomfortable resemblance to political apartheid." See *ante*, at 647. The distinction is untenable.

Racial gerrymanders come in various shades: At-large voting schemes, see, *e. g.*, *White* v. *Regester*, 412 U. S. 755 (1973); the fragmentation of a minority group among various districts "so that it is a majority in none," *Voinovich* v. *Quilter*, 507 U. S. 146, 153 (1993), otherwise known as "cracking," cf. *Connor* v. *Finch*, 431 U. S. 407, 422 (1977); the "stacking" of "a large minority population concentration . . . with a larger white population," Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 85, 92 (C. Davidson ed. 1984); and, finally, the "concentration of [minority voters] into districts where they constitute an excessive majority," *Thornburg* v. *Gingles*, 478 U. S. 30, 46, n. 11 (1986), also called "packing," *Voinovich*, *supra*, at 153. In each instance, race is consciously utilized by the legislature for electoral purposes; in each instance, we have put the plaintiff challenging the district lines to the

burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process.

Not so, apparently, when the districting "segregates" by drawing odd-shaped lines.[7] In that case, we are told, such proof no longer is needed. Instead, it is the *State* that must rebut the allegation that race was taken into account, a fact that, together with the legislators' consideration of ethnic, religious, and other group characteristics, I had thought we practically took for granted, see *supra*, at 660. Part of the explanation for the majority's approach has to do, perhaps, with the emotions stirred by words such as "segregation" and "political apartheid." But their loose and imprecise use by today's majority has, I fear, led it astray. See n. 7, *supra*. The consideration of race in "segregation" cases is no different than in other race-conscious districting; from the standpoint of the affected groups, moreover, the line-drawings all act in similar fashion.[8] A plan that "segregates" being functionally indistinguishable from any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: proof of discriminatory purpose and effect.

The other part of the majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts. Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful

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[7] I borrow the term "segregate" from the majority, but, given its historical connotation, believe that its use is ill advised. Nor is it a particularly accurate description of what has occurred. The majority-minority district that is at the center of the controversy is, according to the State, 54.71% African-American. Brief for State Appellees 5, n. 6. Even if racial distribution was a factor, no racial group can be said to have been "segregated"—*i. e.*, "set apart" or "isolate[d]." Webster's Collegiate Dictionary 1063 (9th ed. 1983).

[8] The black plaintiffs in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), I am confident, would have suffered equally had whites in Tuskegee sought to maintain their control by annexing predominantly white suburbs, rather than splitting the municipality in two.

indicator that some form of gerrymandering (racial or other) might have taken place and that "something may be amiss." *Karcher* v. *Daggett*, 462 U. S. 725, 758 (1983) (STEVENS, J., concurring). Cf. *Connor*, *supra*, at 425. Disregard for geographic divisions and compactness often goes hand in hand with partisan gerrymandering. See *Karcher*, *supra*, at 776 (WHITE, J., dissenting); *Wells* v. *Rockefeller*, 394 U. S. 542, 554 (1969) (WHITE, J., dissenting).

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snakelike, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Gaffney*, 412 U. S., at 752, n. 18; see *ante*, at 647. It is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one.[9] By focusing on looks rather than impact, the majority "immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition." R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459 (1968).

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[9] As has been remarked, "[d]ragons, bacon strips, dumbbells and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an intent to aid one party." Sickels, Dragons, Bacon Strips, and Dumbbells—Who's Afraid of Reapportionment?, 75 Yale L. J. 1300 (1966).

Limited by its own terms to cases involving unusually shaped districts, the Court's approach nonetheless will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation. This will be true in areas where the minority population is geographically dispersed. It also will be true where the minority population is not scattered but, for reasons unrelated to race—for example incumbency protection—the State would rather not create the majority-minority district in its most "obvious" location.[10] When, as is the case here, the creation of

[10] This appears to be what has occurred in this instance. In providing the reasons for the objection, the Attorney General noted that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district" and that such a district would have been no more irregular than others in the State's plan. See App. to Brief for Federal Appellees 10a. North Carolina's decision to create a majority-minority district can be explained as an attempt to meet this objection. Its decision not to create the more compact southern majority-minority district that was suggested, on the other hand, was more likely a result of partisan considerations. Indeed, in a suit brought prior to this one, different plaintiffs charged that District 12 was "grossly contorted" and had "no logical explanation other than incumbency protection and the enhancement of Democratic partisan interests. . . . The plan . . . ignores the directive of the [Department of Justice] to create a minority district in the southeastern portion of North Carolina since any such district would jeopardize the reelection of . . . the Democratic incumbent." App. to Juris. Statement, O. T. 1991, No. 91-2038, p. 43a (Complaint in *Pope* v. *Blue*, No. 3:92CV71-P (WDNC)). With respect to this incident, one writer has observed that "understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act." Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing"?, 14 Cardozo L. Rev. 1237, 1258 (1993). The District Court in *Pope* dismissed appellants' claim, reasoning in part that "plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.'" *Pope* v. *Blue*, 809 F. Supp. 392, 397 (WDNC 1992). We summarily affirmed that decision. 506 U. S. 801 (1992).

a majority-minority district does not unfairly minimize the voting power of any other group, the Constitution does not justify, much less mandate, such obstruction. We said as much in *Gaffney:*

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U. S., at 754.

III

Although I disagree with the holding that appellants' claim is cognizable, the Court's discussion of the level of scrutiny it requires warrants a few comments. I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest. Cf. *UJO,* 430 U. S., at 162–165 (opinion of WHITE, J.); *id.*, at 175–179 (Brennan, J., concurring in part); *id.*, at 180 (Stewart, J., concurring in judgment). Here, the Attorney General objected to the State's plan on the ground that it failed to draw a second majority-minority district for what appeared to be pretextual reasons. Rather than challenge this conclusion, North Carolina chose to draw the second district. As *UJO* held, a State is entitled to take such action. See also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 291 (O'CONNOR, J., concurring in part and concurring in judgment).

The Court, while seemingly agreeing with this position, warns that the State's redistricting effort must be "narrowly tailored" to further its interest in complying with the law. *Ante,* at 658. It is evident to me, however, that what North Carolina did was precisely tailored to meet the objection of the Attorney General to its prior plan. Hence, I see no need

for a remand at all, even accepting the majority's basic approach to this case.

Furthermore, how it intends to manage this standard, I do not know. Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other state interests such as incumbency protection or the representation of rural interests? Of the following two options—creation of two minority influence districts or of a single majority-minority district—is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates § 5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrow tailoring" mean that the most the State can do is preserve the status quo? Or can it maintain that change, while attempting to enhance minority voting power in some other manner? This small sample only begins to scratch the surface of the problems raised by the majority's test. But it suffices to illustrate the unworkability of a standard that is divorced from any measure of constitutional harm. In that, state efforts to remedy minority vote dilution are wholly unlike what typically has been labeled "affirmative action." To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. Cf. *Wygant, supra*, at 295 (WHITE, J., concurring in judgment). It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause of the Constitution, surely, does not stand in the way.

IV

Since I do not agree that appellants alleged an equal protection violation and because the Court of Appeals faithfully followed the Court's prior cases, I dissent and would affirm the judgment below.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE WHITE's dissenting opinion. I did not join Part IV of his opinion in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977), because I felt that its "additional argument," *id.*, at 165, was not necessary to decide that case. I nevertheless agree that the conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly. See, *e. g.*, *Chapman* v. *Meier*, 420 U. S. 1, 17 (1975); *White* v. *Regester*, 412 U. S. 755, 765–766 (1973). It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this "analytically distinct" constitutional claim, *ante*, at 652, is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction. I dissent.

JUSTICE STEVENS, dissenting.

For the reasons stated by JUSTICE WHITE, the decision of the District Court should be affirmed. I add these comments to emphasize that the two critical facts in this case are undisputed: First, the shape of District 12 is so bizarre that it must have been drawn for the purpose of either advantaging or disadvantaging a cognizable group of voters; and, second, regardless of that shape, it *was* drawn for the purpose of facilitating the election of a second black representative from North Carolina.

These unarguable facts, which the Court devotes most of its opinion to proving, give rise to three constitutional questions: Does the Constitution impose a requirement of contiguity or compactness on how the States may draw their electoral districts? Does the Equal Protection Clause prevent a State from drawing district boundaries for the purpose of

facilitating the election of a member of an identifiable group of voters? And, finally, if the answer to the second question is generally "No," should it be different when the favored group is defined by race? Since I have already written at length about these questions,[1] my negative answer to each can be briefly explained.

The first question is easy. There is no independent constitutional requirement of compactness or contiguity, and the Court's opinion (despite its many references to the shape of District 12, see *ante*, at 635–636, 641, 642, 644–648) does not suggest otherwise. The existence of bizarre and uncouth district boundaries is powerful evidence of an ulterior purpose behind the shaping of those boundaries—usually a purpose to advantage the political party in control of the districting process. Such evidence will always be useful in cases that lack other evidence of invidious intent. In this case, however, we know what the legislators' purpose was: The North Carolina Legislature drew District 12 to include a majority of African-American voters. See *ante*, at 634–635. Evidence of the district's shape is therefore convincing, but it is also cumulative, and, for our purposes, irrelevant.

As for the second question, I believe that the Equal Protection Clause is violated when the State creates the kind of uncouth district boundaries seen in *Karcher* v. *Daggett*, 462 U. S. 725 (1983), *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and this case, for the sole purpose of making it more difficult for members of a minority group to win an election.[2] The

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[1] See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 848–852 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972); *Mobile* v. *Bolden*, 446 U. S. 55, 83–94 (1980) (STEVENS, J., concurring in judgment); *Karcher* v. *Daggett*, 462 U. S. 725, 744–765 (1983) (STEVENS, J., concurring); see also *Davis* v. *Bandemer*, 478 U. S. 109, 161–185 (1986) (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part).

[2] See *Karcher*, 462 U. S., at 748 (STEVENS, J., concurring) ("If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of

duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics. The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power. When an assumption that people in a particular minority group (whether they are defined by the political party, religion, ethnic group, or race to which they belong) will vote in a particular way is used to *benefit* that group, no constitutional violation occurs. Politicians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines, and I cannot believe that anything in today's opinion will stop them from doing so in the future.[3]

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the community, they violate the constitutional guarantee of equal protection"); *Davis* v. *Bandemer*, 478 U. S., at 178–183, and nn. 21–24 (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part) (describing "grotesque gerrymandering" and "unusual shapes" drawn solely to deprive Democratic voters of electoral power).

[3]The majority does not acknowledge that we *require* such a showing from plaintiffs who bring a vote dilution claim under §2 of the Voting Rights Act. Under the three-part test established by *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51 (1986), a minority group must show that it could constitute the majority in a single-member district, "that it is politically cohesive," and "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." At least

Finally, we must ask whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. See, *e. g.*, *ante*, at 639–641.[4] A contrary conclusion could only be described as perverse.

Accordingly, I respectfully dissent.

JUSTICE SOUTER, dissenting.

Today, the Court recognizes a new cause of action under which a State's electoral redistricting plan that includes a configuration "so bizarre," *ante*, at 644, that it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race [without] sufficient justification," *ante*, at 649, will be subjected to strict scrutiny. In my view there is no justification for the

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the latter two of these three conditions depend on proving that what the Court today brands as "impermissible racial stereotypes," *ante*, at 647, are true. Because *Gingles* involved North Carolina, which the Court admits has earlier established the existence of "pervasive racial bloc voting," *ante*, at 656, its citizens and legislators—as well as those from other States—will no doubt be confused by the Court's requirement of evidence in one type of case that the Constitution now prevents reliance on in another. The Court offers them no explanation of this paradox.

[4] The Court's opinion suggests that African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting. Not very long ago, of course, it was argued that minority groups defined by race were the only groups the Equal Protection Clause *protected* in this context. See *Mobile* v. *Bolden*, 446 U. S., at 86–90, and nn. 6–10 (STEVENS, J., concurring in judgment).

Court's determination to depart from our prior decisions by carving out this narrow group of cases for strict scrutiny in place of the review customarily applied in cases dealing with discrimination in electoral districting on the basis of race.

I

Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct, and before turning to the different regimes of analysis it will be useful to set out the relevant respects in which such districting differs from the characteristic circumstances in which a State might otherwise consciously consider race. Unlike other contexts in which we have addressed the State's conscious use of race, see, *e. g.*, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989) (city contracting); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986) (teacher layoffs), electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population. As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like "minority voting strength," and "dilution of minority votes," cf. *Thornburg* v. *Gingles*, 478 U. S. 30, 46–51 (1986), and as long as racial bloc voting takes place,[1] legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt.[2] One need look

[1] "Bloc racial voting is an unfortunate phenomenon, but we are repeatedly faced with the findings of knowledgeable district courts that it is a fact of life. Where it exists, most often the result is that neither white nor black can be elected from a district in which his race is in the minority." *Beer* v. *United States*, 425 U. S. 130, 144 (1976) (WHITE, J., dissenting).

[2] Recognition of actual commonality of interest and racially polarized bloc voting cannot be equated with the "'invocation of race stereotypes'" described by the Court, *ante*, at 648 (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 630–631 (1991)), and forbidden by our case law.

no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 161–162 (1977) *(UJO)* (plurality opinion of WHITE, J., joined by Brennan, BLACKMUN, and STEVENS, JJ.); *id.*, at 180, and n. (Stewart, J., joined by Powell, J., concurring in judgment).[3]

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race. Thus, for example, awarding government contracts on a racial basis excludes certain firms from competition on racial grounds. See *Richmond* v. *J. A. Croson Co.*, *supra*, at 493; see also *Fullilove* v. *Klutznick*, 448 U. S. 448, 484 (1980) (opinion of Burger, C. J.). And when race is used to supplant seniority in layoffs, someone is laid off who would not be otherwise. *Wygant* v. *Jackson Bd. of Ed.*, *supra*, at 282–283 (plurality opinion). The same principle pertains in nondistricting aspects of voting law, where race-based discrimination places the disfavored voters at the disadvantage of exclusion from the franchise without any alternative benefit. See, *e. g.*, *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960) (voters alleged to have been excluded from voting in the municipality).

In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right

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[3] Section 5 of the Voting Rights Act requires a covered jurisdiction to demonstrate either to the Attorney General or to the District Court that each new districting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race[,] color, or [membership in a language minority.]" 42 U. S. C. § 1973c; see also § 1973b(f)(2). Section 2 of the Voting Rights Act forbids districting plans that will have a discriminatory effect on minority groups. § 1973.

or benefit provided to others.[4] All citizens may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter's representation. As we have held, one's constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–155 (1971). It is true, of course, that one's vote may be more or less effective depending on the interests of the other individuals who are in one's district, and our cases recognize the reality that members of the same race often have shared interests. "Dilution" thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. See *UJO*, *supra*, at 165 (plurality opinion). This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter.

II

Our different approaches to equal protection in electoral districting and nondistricting cases reflect these differences. There is a characteristic coincidence of disadvantageous effect and illegitimate purpose associated with the State's use of race in those situations in which it has immediately trig-

[4] The majority's use of "segregation" to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not, without more, deny equality of political participation. *Brown* v. *Board of Education*, 347 U. S. 483, 495 (1954). And while *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954), held that requiring segregation in public education served no legitimate public purpose, consideration of race may be constitutionally appropriate in electoral districting decisions in racially mixed political units. See *supra*, at 680–681.

gered at least heightened scrutiny (which every Member of the Court to address the issue has agreed must be applied even to race-based classifications designed to serve some permissible state interest).[5] Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions. To be sure, as the Court says, it would be logically possible to apply strict scrutiny to these cases (and to uphold those uses of race that are permissible), see *ante*, at 653–657. But just because there frequently will be a constitutionally permissible use of race in electoral districting, as exemplified by the consideration of race to comply with the Voting Rights Act (quite apart from the consideration of race to remedy a violation of the Act or the Consti-

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[5] See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–495 (1989) (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE and KENNEDY, JJ.) (referring variously to "strict scrutiny," "the standard of review employed in *Wygant*," and "heightened scrutiny"); *id.*, at 520 (SCALIA, J., concurring in judgment) ("strict scrutiny"); *id.*, at 535 (Marshall, J., dissenting) (classifications "'must serve important governmental objectives and must be substantially related to achievement of those objectives'" (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 359 (1978) (Brennan, WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part)); 488 U. S., at 514–516 (STEVENS, J., concurring in part and concurring in judgment) (undertaking close examination of the characteristics of the advantaged and disadvantaged racial groups said to justify the disparate treatment although declining to articulate different standards of review); see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 279–280 (1986) (plurality opinion of Powell, J.) (equating various articulations of standards of review "more stringent" than "'reasonableness'" with "strict scrutiny"). Of course the Court has not held that the disadvantaging effect of these uses of race can never be justified by a sufficiently close relationship to a sufficiently strong state interest. See, *e. g.*, *Croson*, *supra*, at 509 (plurality opinion).

tution), it has seemed more appropriate for the Court to identify impermissible uses by describing particular effects sufficiently serious to justify recognition under the Fourteenth Amendment. Under our cases there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy. See *UJO*, 430 U. S., at 165–166 (plurality opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.); *id.*, at 179–180 (Stewart, J., joined by Powell, J., concurring in judgment). JUSTICE WHITE describes the formulations we have used and the common categories of dilutive practice in his dissenting opinion. See *ante*, at 661–663, 669–670.[6]

A consequence of this categorical approach is the absence of any need for further searching "scrutiny" once it has been shown that a given districting decision has a purpose and effect falling within one of those categories. If a cognizable harm like dilution or the abridgment of the right to participate in the electoral process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not. Under this approach, in the absence of an allegation of such cognizable harm, there is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm. Nor if dilution is proven is there any need for further constitutional scrutiny; there has never been a suggestion that such use of race could be justified under any type of scrutiny, since the dilution of the right to vote can not be said to serve any legitimate governmental purpose.

There is thus no theoretical inconsistency in having two distinct approaches to equal protection analysis, one for

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[6] In this regard, I agree with JUSTICE WHITE's assessment of the difficulty the white plaintiffs would have here in showing that their opportunity to participate equally in North Carolina's electoral process has been unconstitutionally diminished. See *ante*, at 666–667, and n. 6 (dissenting opinion).

cases of electoral districting and one for most other types of state governmental decisions. Nor, because of the distinctions between the two categories, is there any risk that Fourteenth Amendment districting law as such will be taken to imply anything for purposes of general Fourteenth Amendment scrutiny about "benign" racial discrimination, or about group entitlement as distinct from individual protection, or about the appropriateness of strict or other heightened scrutiny.[7]

III

The Court appears to accept this, and it does not purport to disturb the law of vote dilution in any way. See *ante*, at 652 (acknowledging that "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution"). Instead, the Court creates a new "analytically distinct," *ibid.*, cause of action, the principal element of which is that a districting plan be "so bizarre on its face," *ante*, at 644, or "irrational on its face," *ante*, at 652, or "extremely irregular on its face," *ante*, at 642, that it "rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification," *ante*, at 652. Pleading such an element, the Court holds, suffices without a further allegation of harm, to state a claim upon which relief can be granted under the Fourteenth Amendment. See *ante*, at 649.

It may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberra-

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[7] The Court accuses me of treating the use of race in electoral redistricting as a "benign" form of discrimination. *Ante*, at 653. What I am saying is that in electoral districting there frequently are permissible uses of race, such as its use to comply with the Voting Rights Act, as well as impermissible ones. In determining whether a use of race is permissible in cases in which there is a bizarrely shaped district, we can readily look to its effects, just as we would in evaluating any other electoral districting scheme.

tion. The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here. It may therefore be that few electoral districting cases are ever likely to employ the strict scrutiny the Court holds to be applicable on remand if appellants' allegations are "not contradicted." *Ante*, at 653; see also *ante*, at 658.[8]

Nonetheless, in those cases where this cause of action is sufficiently pleaded, the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven, in the absence of which the use of race may be invalidated only if it is shown to serve no legitimate state purpose. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954).

The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims.[9] The only justification I

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[8] While the Court "express[es] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim," *ante*, at 649 (quoting *ante*, at 668 (WHITE, J., dissenting)), it repeatedly emphasizes that there is some reason to believe that a configuration devised with reference to traditional districting principles would present a case falling outside the cause of action recognized today. See *ante*, at 642, 649, 652, 657–658.

[9] The Court says its new cause of action is justified by what I understand to be some ingredients of stigmatic harm, see *ante*, at 647–648, and by a "threa[t] to . . . our system of representative democracy," *ante*, at 650, both caused by the mere adoption of a districting plan with the elements I have described in the text, *supra*, at 685. To begin with, the complaint nowhere alleges any type of stigmatic harm. See App. to Juris. Statement 67a–100a (Complaint and Motion for Preliminary Injunction and For Temporary Restraining Order). Putting that to one side, it seems utterly implausible to me to presume, as the Court does, that North Carolina's creation of this strangely shaped majority-minority district "generates" within the white plaintiffs here anything comparable to "a feeling of inferi-

can imagine would be the preservation of "sound districting principles," *UJO*, 430 U. S., at 168, such as compactness and contiguity. But as JUSTICE WHITE points out, see *ante*, at 672 (dissenting opinion), and as the Court acknowledges, see *ante*, at 647, we have held that such principles are not constitutionally required, with the consequence that their absence cannot justify the distinct constitutional regime put in place by the Court today. Since there is no justification for the departure here from the principles that continue to govern electoral districting cases generally in accordance with our prior decisions, I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. In the absence of an allegation of such harm, I would affirm the judgment of the District Court. I respectfully dissent.

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ority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U. S., at 494. As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.

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UNITED STATES *v.* DIXON ET AL.

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-1231. Argued December 2, 1992—Decided June 28, 1993

Based on respondent Dixon's arrest and indictment for possession of cocaine with intent to distribute, he was convicted of criminal contempt for violating a condition of his release on an unrelated offense forbidding him to commit "any criminal offense." The trial court later dismissed the cocaine indictment on double jeopardy grounds. Conversely, the trial court in respondent Foster's case ruled that double jeopardy did not require dismissal of a five-count indictment charging him with simple assault (Count I), threatening to injure another on three occasions (Counts II–IV), and assault with intent to kill (Count V), even though the events underlying the charges had previously prompted his trial for criminal contempt for violating a civil protection order (CPO) requiring him not to "'assault . . . or in any manner threaten . . .'" his estranged wife. The District of Columbia Court of Appeals consolidated the two cases on appeal and ruled that both subsequent prosecutions were barred by the Double Jeopardy Clause under *Grady* v. *Corbin*, 495 U. S. 508.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

598 A. 2d 724, affirmed in part, reversed in part, and remanded.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. The Double Jeopardy Clause's protection attaches in nonsummary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecution, the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the "same-elements" or "*Blockburger*" test. See, *e. g.*, *Blockburger* v. *United States*, 284 U. S. 299, 304. That test inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" within the Clause's meaning, and double jeopardy bars subsequent punishment or prosecution. The Court recently held in *Grady* that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. That test provides that, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct

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that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had. 495 U. S., at 510. Pp. 694–697.

2. Although prosecution under Counts II–V of Foster's indictment would undoubtedly be barred by the *Grady* "same-conduct" test, *Grady* must be overruled because it contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion. Unlike *Blockburger* analysis, the *Grady* test lacks constitutional roots. It is wholly inconsistent with this Court's precedents and with the clear common-law understanding of double jeopardy. See *Grady*, *supra*, at 526 (SCALIA, J., dissenting). *In re Nielsen*, 131 U. S. 176, and subsequent cases stand for propositions that are entirely in accord with *Blockburger* and that do not establish even minimal antecedents for the *Grady* rule. In contrast, two post-*Nielsen* cases, *Gavieres* v. *United States*, 220 U. S. 338, 343, and *Burton* v. *United States*, 202 U. S. 344, 379–381, upheld subsequent prosecutions because the *Blockburger* test (and *only* the *Blockburger* test) was satisfied. Moreover, the *Grady* rule has already proved unstable in application, see *United States* v. *Felix*, 503 U. S. 378. Although the Court does not lightly reconsider precedent, it has never felt constrained to follow prior decisions that are unworkable or badly reasoned. Pp. 703–712.

JUSTICE SCALIA, joined by JUSTICE KENNEDY, concluded in Part III that:

1. Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution fails the *Blockburger* test. Dixon's contempt sanction was imposed for violating the order through commission of the incorporated drug offense. His "crime" of violating a condition of his release cannot be abstracted from the "element" of the violated condition. *Harris* v. *Oklahoma*, 433 U. S. 682 *(per curiam)*. Here, as in *Harris*, the underlying substantive criminal offense is a "species of lesser-included offense," *Illinois* v. *Vitale*, 447 U. S. 410, 420, whose subsequent prosecution is barred by the Double Jeopardy Clause. The same analysis applies to Count I of Foster's indictment, and that prosecution is barred. Pp. 697–700.

2. However, the remaining four counts of Foster's indictment are not barred under *Blockburger*. Foster's first prosecution for violating the CPO provision forbidding him to assault his wife does not bar his later prosecution under Count V, which charges assault with intent to kill. That offense requires proof of specific intent to kill, which the contempt offense did not. Similarly, the contempt crime required proof of knowledge of the CPO, which the later charge does not. The two crimes were different offenses under the *Blockburger* test. Counts II, III, and IV are likewise not barred. Pp. 700–703.

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JUSTICE WHITE, joined by JUSTICE STEVENS, concluded that, because the Double Jeopardy Clause bars prosecution for an offense if the defendant already has been held in contempt for its commission, both Dixon's prosecution for possession with intent to distribute cocaine and Foster's prosecution for simple assault were prohibited. Pp. 720, 731–733.

JUSTICE SOUTER, joined by JUSTICE STEVENS, concluded that the prosecutions below were barred by the Double Jeopardy Clause under this Court's successive prosecution decisions (from *In re Nielsen*, 131 U. S. 176, to *Grady* v. *Corbin*, 495 U. S. 508), which hold that even if the *Blockburger* test is satisfied, a second prosecution is not permitted for conduct comprising the criminal act charged in the first. Because Dixon's contempt prosecution proved beyond a reasonable doubt that he had possessed cocaine with intent to distribute it, his prosecution for possession with intent to distribute cocaine based on the same incident is barred. Similarly, since Foster has already been convicted in his contempt prosecution for the act of simple assault charged in Count I of his indictment, his subsequent prosecution for simple assault is barred. Pp. 761–763.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and an opinion with respect to Parts III and V, in which KENNEDY, J., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 713. WHITE, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEVENS, J., joined, and in which SOUTER, J., joined as to Part I, *post*, p. 720. BLACKMUN, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 741. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 743.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Mueller, James A. Feldman*, and *Deborah Watson*.

James W. Klein argued the cause for respondents. With him on the brief were *Elizabeth G. Taylor* and *Rosemary Herbert*.*

**Clifton S. Elgarten, Susan M. Hoffman, Susan Deller Ross, Naomi Cahn, Laura Foggan*, and *Catherine F. Klein* filed a brief for Ayuda et al. as *amici curiae* urging reversal.

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Parts III and V, in which JUSTICE KENNEDY joins.

In both of these cases, respondents were tried for criminal contempt of court for violating court orders that prohibited them from engaging in conduct that was later the subject of a criminal prosecution. We consider whether the subsequent criminal prosecutions are barred by the Double Jeopardy Clause.

I

Respondent Alvin Dixon was arrested for second-degree murder and was released on bond. Consistent with the District of Columbia's bail law authorizing the judicial officer to impose any condition that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community," D. C. Code Ann. §23–1321(a) (1989), Dixon's release form specified that he was not to commit "any criminal offense," and warned that any violation of the conditions of release would subject him "to revocation of release, an order of detention, and prosecution for contempt of court." See D. C. Code Ann. §23–1329(a) (1989) (authorizing those sanctions).

While awaiting trial, Dixon was arrested and indicted for possession of cocaine with intent to distribute, in violation of D. C. Code Ann. §33–541(a)(1) (1988). The court issued an order requiring Dixon to show cause why he should not be held in contempt or have the terms of his pretrial release modified. At the show-cause hearing, four police officers testified to facts surrounding the alleged drug offense; Dixon's counsel cross-examined these witnesses and introduced other evidence. The court concluded that the Government had established "'beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute.'" 598 A. 2d 724, 728 (D. C. 1991). The court therefore found Dixon guilty of

criminal contempt under § 23–1329(c), which allows contempt sanctions after expedited proceedings without a jury and "in accordance with principles applicable to proceedings for criminal contempt." For his contempt, Dixon was sentenced to 180 days in jail. § 23–1329(c) (maximum penalty of six months' imprisonment and $1,000 fine). He later moved to dismiss the cocaine indictment on double jeopardy grounds; the trial court granted the motion.

Respondent Michael Foster's route to this Court is similar. Based on Foster's alleged physical attacks upon her in the past, Foster's estranged wife Ana obtained a civil protection order (CPO) in Superior Court of the District of Columbia. See D. C. Code Ann. § 16–1005(c) (1989) (CPO may be issued upon a showing of good cause to believe that the subject "has committed or is threatening an intrafamily offense"). The order, to which Foster consented, required that he not "'molest, assault, or in any manner threaten or physically abuse'" Ana Foster; a separate order, not implicated here, sought to protect her mother. 598 A. 2d, at 725–726.

Over the course of eight months, Ana Foster filed three separate motions to have her husband held in contempt for numerous violations of the CPO. Of the 16 alleged episodes, the only charges relevant here are three separate instances of threats (on November 12, 1987, and March 26 and May 17, 1988) and two assaults (on November 6, 1987, and May 21, 1988), in the most serious of which Foster "threw [his wife] down basement stairs, kicking her body[,] . . . pushed her head into the floor causing head injuries, [and Ana Foster] lost consciousness." 598 A. 2d, at 726.

After issuing a notice of hearing and ordering Foster to appear, the court held a 3-day bench trial. Counsel for Ana Foster and her mother prosecuted the action; the United States was not represented at trial, although the United States Attorney was apparently aware of the action, as was the court aware of a separate grand jury proceeding on some of the alleged criminal conduct. As to the assault charges,

the court stated that Ana Foster would have "to prove as an element, first that there was a Civil Protection Order, and then [that] . . . the assault as defined by the criminal code, in fact occurred." Tr. in Nos. IF–630–87, IF–631–87 (Aug. 8, 1988), p. 367; accord, *id.*, at 368. At the close of the plaintiffs' case, the court granted Foster's motion for acquittal on various counts, including the alleged threats on November 12 and May 17. Foster then took the stand and generally denied the allegations. The court found Foster guilty beyond a reasonable doubt of four counts of criminal contempt (three violations of Ana Foster's CPO, and one violation of the CPO obtained by her mother), including the November 6, 1987, and May 21, 1988, assaults, but acquitted him on other counts, including the March 26 alleged threats. He was sentenced to an aggregate 600 days' imprisonment. See § 16–1005(f) (authorizing contempt punishment); Super. Ct. of D. C. Intrafamily Rules 7(c), 12(e) (1987) (maximum punishment of six months' imprisonment and $300 fine).

The United States Attorney's Office later obtained an indictment charging Foster with simple assault on or about November 6, 1987 (Count I, violation of § 22–504); threatening to injure another on or about November 12, 1987, and March 26 and May 17, 1988 (Counts II–IV, violation of § 22–2307); and assault with intent to kill on or about May 21, 1988 (Count V, violation of § 22–501). App. 43–44. Ana Foster was the complainant in all counts; the first and last counts were based on the events for which Foster had been held in contempt, and the other three were based on the alleged events for which Foster was acquitted of contempt. Like Dixon, Foster filed a motion to dismiss, claiming a double jeopardy bar to all counts, and also collateral estoppel as to Counts II–IV. The trial court denied the double jeopardy claim and did not rule on the collateral-estoppel assertion.

The Government appealed the double jeopardy ruling in *Dixon*, and Foster appealed the trial court's denial of his motion. The District of Columbia Court of Appeals consoli-

dated the two cases, reheard them en banc, and, relying on our recent decision in *Grady* v. *Corbin*, 495 U. S. 508 (1990), ruled that both subsequent prosecutions were barred by the Double Jeopardy Clause. 598 A. 2d, at 725. In its petition for certiorari, the Government presented the sole question "[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court." Pet. for Cert. I. We granted certiorari, 503 U. S. 1004 (1992).

II

To place these cases in context, one must understand that they are the consequence of a historically anomalous use of the contempt power. In both *Dixon* and *Foster*, a court issued an order directing a particular individual not to commit criminal offenses. (In Dixon's case, the court incorporated the entire criminal code; in Foster's case, the criminal offense of simple assault.) That could not have occurred at common law, or in the 19th-century American judicial system.

At common law, the criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings. 4 W. Blackstone, Commentaries *280–*285. That limitation was closely followed in American courts. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812); R. Goldfarb, The Contempt Power 12–20 (1963). Federal courts had power to "inforce the observance of order," but those "implied powers" could not support common-law jurisdiction over criminal acts. *Hudson*, *supra*, at 34. In 1831, Congress amended the Judiciary Act of 1789, allowing federal courts the summary contempt power to punish generally "disobedience or resistance" to court orders. §1, Act of March 2, 1831, 4 Stat. 487–488. See *Bloom* v. *Illinois*, 391 U. S. 194, 202–204 (1968) (discussing evolution of federal courts' statutory contempt power).

The 1831 amendment of the Judiciary Act still would not have given rise to orders of the sort at issue here, however, since there was a long common-law tradition against judicial orders prohibiting violation of the law. Injunctions, for example, would not issue to forbid infringement of criminal or civil laws, in the absence of some separate injury to private interest. See, *e. g.*, 3 Blackstone, *supra*, at *426, n. 1; J. High, Law of Injunctions § 23, pp. 15–17, and notes (1873) (citing English cases); C. Beach, Law of Injunctions §§ 58–59, pp. 71–73 (1895) (same). The interest protected by the criminal or civil prohibition was to be vindicated at law—and though equity might enjoin harmful acts that happened to violate civil or criminal law, it would not enjoin violation of civil or criminal law *as such*. See, *e. g.*, *Sparhawk* v. *Union Passenger R. Co.*, 54 Pa. St. 401, 422–424 (1867) (refusing to enjoin railroad's violation of Sunday closing law); *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 371, 378 (N. Y. 1817) (refusing to enjoin violation of banking statute).

It is not surprising, therefore, that the double jeopardy issue presented here—whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense—did not arise at common law, or even until quite recently in American cases. See generally Zitter, Contempt Finding as Precluding Substantive Criminal Charges Relating to Same Transaction, 26 A. L. R. 4th 950, 953–956 (1983). English and earlier American cases do report instances in which prosecution for criminal contempt of court—as originally understood—did not bar a subsequent prosecution for a criminal offense based on the same conduct. See, *e. g.*, *King* v. *Lord Ossulston*, 2 Str. 1107, 93 Eng. Rep. 1063 (K. B. 1739); *State* v. *Yancy*, 4 N. C. 133 (1814). But those contempt prosecutions were for disruption of judicial process, in which the disruptive conduct happened also to be criminal.

The Double Jeopardy Clause, whose application to this new context we are called upon to consider, provides that no

person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. This protection applies both to successive punishments and to successive prosecutions for the same criminal offense. See *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is "a crime in the ordinary sense." *Bloom*, *supra*, at 201. Accord, *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392 (1874).

We have held that constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions. See, *e. g.*, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444 (1911) (presumption of innocence, proof beyond a reasonable doubt, and guarantee against self-incrimination); *Cooke* v. *United States*, 267 U. S. 517, 537 (1925) (notice of charges, assistance of counsel, and right to present a defense); *In re Oliver*, 333 U. S. 257, 278 (1948) (public trial). We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches. Accord, *Menna* v. *New York*, 423 U. S. 61 (1975) *(per curiam)*; *Colombo* v. *New York*, 405 U. S. 9 (1972) *(per curiam)*.

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 168–169 (1977); *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932) (multiple punishment); *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. In a case such as *Yancy*, for example, in which

the contempt prosecution was for disruption of judicial business, the same-elements test would not bar subsequent prosecution for the criminal assault that was part of the disruption, because the contempt offense did not require the element of criminal conduct, and the criminal offense did not require the element of disrupting judicial business.[1]

We recently held in *Grady* that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. The *Grady* test provides that, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had. 495 U. S., at 510.

III

A

The first question before us today is whether *Blockburger* analysis permits subsequent prosecution in this new criminal contempt context, where judicial order has prohibited criminal act. If it does, we must then proceed to consider whether *Grady* also permits it. See *Grady*, *supra*, at 516.

We begin with *Dixon*. The statute applicable in Dixon's contempt prosecution provides that "[a] person who has been conditionally released . . . and who has violated a condition of release shall be subject to . . . prosecution for contempt of court." § 23–1329(a). Obviously, Dixon could not commit an "offence" under this provision until an order setting out conditions was issued. The statute by itself imposes no legal obligation on anyone. Dixon's cocaine possession, although an offense under D. C. Code Ann. § 33–541(a) (1988 and Supp. 1992), was not an offense under § 23–1329 until a

[1] *State* v. *Yancy*, 4 N. C. 133 (1814), it should be noted, involved what is today called summary contempt. We have not held, and do not mean by this example to decide, that the double jeopardy guarantee applies to such proceedings.

judge incorporated the statutory drug offense into his release order.

In this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute Dixon for the drug offense resembles the situation that produced our judgment of double jeopardy in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*. There we held that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony. We have described our terse *per curiam* in *Harris* as standing for the proposition that, for double jeopardy purposes, "the crime generally described as felony murder" is not "a separate offense distinct from its various elements." *Illinois* v. *Vitale*, 447 U. S. 410, 420–421 (1980). Accord, *Whalen* v. *United States*, 445 U. S. 684, 694 (1980). So too here, the "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is "a species of lesser-included offense."[2] *Vitale, supra*, at 420. Accord, *Whalen, supra*.

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[2] In order for the same analysis to be applicable to violation of a statute criminalizing disobedience of a lawful police order, as THE CHIEF JUSTICE's dissent on this point hypothesizes, see *post*, at 719, the statute must embrace police "orders" that "command" the noncommission of crimes—for instance, "Don't shoot that man!" It seems to us unlikely that a "police order" statute would be interpreted in this fashion, rather than as addressing *new* obligations imposed by lawful order of police (for example, the obligation to remain behind police lines, or to heed a command to "Freeze!"). If, however, such a statute were interpreted to cover police orders forbidding crimes, the Double Jeopardy Clause would as a practical matter bar subsequent prosecution only for relatively minor offenses, such

To oppose this analysis, the Government can point only to dictum in *In re Debs*, 158 U. S. 564, 594, 599–600 (1895), which, to the extent it attempted to exclude certain nonsummary contempt prosecutions from various constitutional protections for criminal defendants, has been squarely rejected by cases such as *Bloom*, 391 U. S., at 208. The Government also relies upon *In re Chapman*, 166 U. S. 661 (1897), and *Jurney* v. *MacCracken*, 294 U. S. 125 (1935), which recognize Congress' power to punish as contempt the refusal of a witness to testify before it. But to say that Congress can punish such a refusal is not to say that a criminal court can punish the same refusal *yet again*. Neither case dealt with that issue, and *Chapman* specifically declined to address it, noting that successive prosecutions (before Congress for contemptuous refusal to testify and before a court for violation of a federal statute making such refusal a crime) were "improbable." 166 U. S., at 672.

Both the Government, Brief for United States 15–17, and JUSTICE BLACKMUN, *post*, at 743, contend that the legal obligation in Dixon's case may serve "interests . . . fundamentally different" from the substantive criminal law, because it derives in part from the determination of a court rather than a determination of the legislature. That distinction seems questionable, since the court's power to establish conditions of release, and to punish their violation, was conferred by statute; the legislature was the ultimate source of both the criminal and the contempt prohibition. More importantly, however, the distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the *offenses* are the same, not the interests that the offenses violate. And this Court stated long ago that criminal con-

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as assault (the only conceivable lesser included offense of an order not to "shoot")—unless one assumes that constables often order the noncommission of serious crimes (for example, "Don't murder that man!") and that serious felons such as murderers are first prosecuted for disobeying police orders.

tempt, at least in its nonsummary form, "is a crime in every fundamental respect." *Bloom, supra,* at 201; accord, *e. g., Steamship Co.,* 20 Wall., at 392. Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause.

The foregoing analysis obviously applies as well to Count I of the indictment against Foster, charging assault in violation of § 22–504, based on the same event that was the subject of his prior contempt conviction for violating the provision of the CPO forbidding him to commit simple assault under § 22–504.[3] The subsequent prosecution for assault fails the *Blockburger* test, and is barred.[4]

B

The remaining four counts in *Foster,* assault with intent to kill (Count V; § 22–501) and threats to injure or kidnap (Counts II–IV; § 22–2307), are not barred under *Blockburger.* As to Count V: Foster's conduct on May 21, 1988, was found to violate the Family Division's order that he not "molest, assault, or in any manner threaten or physically abuse" his wife. At the contempt hearing, the court stated that Ana

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[3] It is not obvious that the word "assault" in the CPO bore the precise meaning "assault under § 22–504." The court imposing the contempt construed it that way, however, and the point has not been contested in this litigation.

[4] JUSTICE WHITE complains that this section of our opinion gives the arguments of the United States "short shrift," *post,* at 720, and treats them in "conclusory" fashion, *post,* at 721. He then proceeds to reject these arguments, largely by agreeing with our analysis, *post,* at 721, 722, 724, 726. We think it unnecessary, and indeed undesirable, to address at any greater length than we have arguments based on dictum and inapplicable doctrines such as dual sovereignty. The remainder of that part of JUSTICE WHITE's opinion that deals with this issue argues—by no means in conclusory fashion—that its practical consequences for law enforcement are not serious. *Post,* at 727–731. He may be right. But we do not share his "pragmatic" view, *post,* at 739, that the meaning of the Double Jeopardy Clause depends upon our approval of its consequences.

Foster's attorney, who prosecuted the contempt, would have to prove, first, knowledge of a CPO, and, second, a willful violation of one of its conditions, here simple assault as defined by the criminal code.[5] See, *e. g.*, 598 A. 2d, at 727–728; *In re Thompson*, 454 A. 2d 1324, 1326 (D. C. 1982); accord, *Parker* v. *United States*, 373 A. 2d 906, 907 (D. C. 1977) *(per curiam)*. On the basis of the same episode, Foster was then indicted for violation of § 22–501, which proscribes assault with intent to kill. Under governing law, that offense requires proof of specific intent to kill; simple assault does not.[6] See *Logan* v. *United States*, 483 A. 2d 664, 672–673 (D. C. 1984). Similarly, the contempt offense required proof of knowledge of the CPO, which assault with intent to kill does not. Applying the *Blockburger* elements test, the result is clear: These crimes were different offenses, and the sub-

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[5] Given this requirement of *willful* violation of the order, JUSTICE WHITE's desire to "put to the side the CPO," because it only "triggered the court's authority" cannot be reconciled with his desire to "compar[e] the substantive offenses of which respondents stood accused." *Post*, at 734. The "substantive offense" of criminal contempt is willful violation of a court order. Far from a mere jurisdictional device, that order (or CPO) is the centerpiece of the entire proceeding. Its terms define the prohibited conduct, its existence supports imposition of a criminal penalty, and willful violation of it is necessary for conviction. To ignore the CPO when determining whether two offenses are the "same" is no more possible than putting aside the statutory definitions of criminal offenses. Of course, JUSTICE WHITE's view that the elements of criminal contempt are essentially irrelevant for double jeopardy analysis does have precedent—albeit erroneous—in *Grady*'s same-conduct test. *Grady* v. *Corbin*, 495 U. S. 508 (1990). JUSTICE SOUTER also ignores the knowledge element. *Post*, at 761, n. 10.

[6] We accept, as we ordinarily do, the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals. See, *e. g.*, *Pernell* v. *Southall Realty*, 416 U. S. 363, 368–369 (1974). The construction here has sound support in the text of the statute. Compare D. C. Code Ann. § 22–501 (1989) (assault with intent to kill, rob, rape, or poison) with § 22–504 (assault).

sequent prosecution did not violate the Double Jeopardy Clause.[7]

Counts II, III, and IV of Foster's indictment are likewise not barred. These charged Foster under § 22–2307 (forbidding anyone to "threate[n] . . . to kidnap any person or to injure the person of another or physically damage the property of any person") for his alleged threats on three separate dates. Foster's contempt prosecution included charges that, on the same dates, he violated the CPO provision ordering that he not "in any manner threaten" Ana Foster. Conviction of the contempt required willful violation of the CPO—which conviction under § 22–2307 did not; and conviction under § 22–2307 required that the threat be a threat to kidnap, to inflict bodily injury, or to damage property—which conviction of the contempt (for violating the CPO provision that Foster not "in any manner threaten") did not.[8] Each

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[7] JUSTICE WHITE's suggestion, *post*, at 737–738, that if Foster received a lesser-included-offense instruction on assault at his trial for assault with intent to kill, we would uphold a conviction on that lesser count is simply wrong. Under basic *Blockburger* analysis, Foster may neither be tried a second time for assault nor again convicted for assault, as we have concluded as to Count I (charging simple assault). Thus, Foster certainly does receive the "full constitutional protection to which he is entitled," *post*, at 738, n. 10: he may neither be tried nor convicted a second time for assault. That does not affect the conclusion that trial and conviction for assault with intent to kill are *not* barred. It merely illustrates the unremarkable fact that one offense (simple assault) may be an included offense of two offenses (violation of the CPO for assault, and assault with intent to kill) that are separate offenses under *Blockburger*.

[8] We think it is highly artificial to interpret the CPO's prohibition of threatening "in any manner," as JUSTICE WHITE would interpret it, to refer only to threats that violate the District's criminal laws. *Post*, at 732–733, n. 7. The only threats meeting that definition would have been threats to do physical harm, to kidnap, or to damage property. See D. C. Code Ann. §§ 22–507, 22–2307 (1989). Threats to stalk, to frighten, to cause intentional embarrassment, to make harassing phone calls, to make false reports to employers or prospective employers, to harass by phone calls or otherwise at work—to mention only a few of the additional threats that might be anticipated in this domestic situation—would not be cov-

offense therefore contained a separate element, and the *Blockburger* test for double jeopardy was not met.

IV

Having found that at least some of the counts at issue here are not barred by the *Blockburger* test, we must consider whether they are barred by the new, additional double jeopardy test we announced three Terms ago in *Grady* v. *Corbin*.[9] They undoubtedly are, since *Grady* prohibits "a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution [here, assault as an element of assault with intent to kill, or threatening as an element of threatening bodily injury], the government will

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ered. Surely "in any manner threaten" should cover at least all threats to commit acts that would be tortious under District of Columbia law (which would be consistent with the trial court's later reference to a "legal threat"). Thus, under our *Blockburger* analysis the aggravated threat counts and the assault-with-intent-to-kill count come out the same way.

[9] JUSTICE WHITE attempts to avoid this issue altogether because, in his view, it would be "injudicious" to consider the differences in *Foster*, not pressed by the Government, between the CPO restrictions and the alleged statutory offenses. *Post*, at 740. Of course, these differences are pure facts, apparent on the face of the CPO and the indictment. They do not alter the question presented, which assumes only that the prosecuted *conduct* was the same, see *supra*, at 694, not that the terms of the CPO and the statute were. Further, although the Government did not argue that the different counts in *Foster* should come out differently, it did argue (as we do) that they *all* should be evaluated under *Blockburger* and not *Grady*, see, *e. g.*, Brief for United States 14–15, 42; and we are not aware of any principle that prevents us from accepting a litigant's legal theory unless we agree with the litigant on all the applications of the theory. The standard to be applied in determining the double jeopardy effect of criminal charges based on the same conduct (*Blockburger* vs. *Grady*) assuredly *is* included within the question presented. That makes JUSTICE WHITE's citation of cases declining to consider legal issues not raised below wholly beside the point. Nor can we see any abuse of what JUSTICE WHITE himself regards as a prudential limitation, when the evident factual difference between the charges and the CPO order is central to proper constitutional analysis.

prove conduct that constitutes an offense for which the defendant has already been prosecuted [here, the assault and the threatening, which conduct constituted the offense of violating the CPO]." 495 U. S., at 510.

We have concluded, however, that *Grady* must be overruled. Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the "same offence," U. S. Const., Amdt. 5, has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The "same-conduct" rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy. See, *e. g.*, *Gavieres* v. *United States*, 220 U. S., at 345 (in subsequent prosecution, "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other"). We need not discuss the many proofs of these statements, which were set forth at length in the *Grady* dissent. See 495 U. S., at 526 (opinion of SCALIA, J.). We will respond, however, to the contrary contentions of today's pro-*Grady* dissents.

The centerpiece of JUSTICE SOUTER's analysis is an appealing theory of a "successive prosecution" strand of the Double Jeopardy Clause that has a different meaning from its supposed "successive punishment" strand. We have often noted that the Clause serves the function of preventing both successive punishment and successive prosecution, see, *e. g.*, *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), but there is *no* authority, except *Grady*, for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offence" (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense. JUSTICE SOUTER provides no authority whatsoever (and we are aware of none) for the bald assertion that "we have long held that [the government]

must sometimes bring its prosecutions for [separate] offenses together." *Post*, at 747. The collateral-estoppel effect attributed to the Double Jeopardy Clause, see *Ashe* v. *Swenson*, 397 U. S. 436 (1970), may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts. But this does not establish that the Government "must . . . bring its prosecutions . . . together." It is entirely free to bring them separately, and can win convictions in both. Of course the collateral-estoppel issue is not raised in this case.

JUSTICE SOUTER relies upon four cases to establish the existence of some minimal antecedents to *Grady*. *Post*, at 749–758. The fountainhead of the "same-conduct" rule, he asserts, is *In re Nielsen*, 131 U. S. 176 (1889). That is demonstrably wrong. *Nielsen* simply applies the common proposition, entirely in accord with *Blockburger*, that prosecution for a greater offense (cohabitation, defined to require proof of adultery) bars prosecution for a lesser included offense (adultery). That is clear from the *Nielsen* Court's framing of the question ("Being of opinion, therefore, that habeas corpus was a proper remedy for the petitioner, *if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished*, that question is now to be considered," 131 U. S., at 185 (emphasis added)), from its legal analysis, *id.*, at 186–189, and from its repeated observations that cohabitation required proof of adultery, *id.*, at 187, 189.[10]

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[10] JUSTICE SOUTER has apparently been led astray by his misinterpretation of the word "incidents" in the following passage of *Nielsen:* "[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." 131 U. S., at 188. He apparently takes "incident" to mean "event" or "conduct." See *post*, at 752, and n. 5, 757–758. What it obviously means, however, is "element." See Black's Law Dictionary 762 (6th ed. 1990) (defining "incidents of ownership"); J. Bouvier, Law Dictionary 783–784 (1883) (defining "incident" and giving examples of "incident to a

His second case comes almost a century later. *Brown* v. *Ohio*, 432 U. S. 161 (1977), contains no support for his position except a footnote that cites *Nielsen* for the proposition that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Brown*, *supra*, at 166–167, n. 6. Not only is this footnote the purest dictum, but it flatly contradicts the text of the opinion which, on the very next page, describes *Nielsen* as the first Supreme Court case to endorse the *Blockburger* rule. *Brown*, *supra*, at 168. Quoting that suspect dictum multiple times, see *post*, at 748, 754, cannot convert it into case law. See *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 463, n. 11 (1993) (emphasizing "the need to distinguish an opinion's holding from its dicta"). The holding of *Brown*, like that of *Nielsen*, rests squarely upon the existence of a lesser included offense. 432 U. S., at 162 (setting out question presented).

The third case is *Harris*, which JUSTICE SOUTER asserts was a reaffirmation of what he contends was the earlier holding in *Nielsen*, that the *Blockburger* test is "insufficien[t] for determining when a successive prosecution [is] barred," and that conduct, and not merely elements of the offense, must be the object of inquiry. *Post*, at 755. Surely not. *Harris* never uses the word "conduct," and its entire discussion focuses on the *elements* of the two offenses. See, *e. g.*, 433 U. S., at 682–683, n. (to prove felony murder, "it was necessary for all the ingredients of the underlying felony" to be proved). Far from validating JUSTICE SOUTER's extraordinarily implausible reading of *Nielsen*, *Harris* plainly rejects that reading, treating the earlier case as having focused (like *Blockburger*) upon the elements of the offense. Immedi-

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reversion," and "incidents" to a contract). That is perfectly clear from the very next sentence of *Nielsen* (which JUSTICE SOUTER does not quote): "It may be contended that adultery is not an incident of unlawful cohabitation . . . ." 131 U. S., at 189.

ately after stating that conviction for felony murder, a "greater crime," "cannot be had without conviction of the lesser crime," the *Harris* Court quotes *Nielsen*'s statement that "'a person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents.'" 433 U. S., at 682–683, quoting from 131 U. S., at 188. It is clear from that context that *Harris* regarded "incidents included" to mean "offenses included"—a reference to defined crimes rather than to conduct.

Finally, JUSTICE SOUTER misdescribes *Vitale*. Despite his bold assertion to the contrary, see *post*, at 757, *Vitale* unquestionably reads *Harris* as merely an application of the double jeopardy bar to lesser and greater included offenses.[11] JUSTICE SOUTER instead elevates the statement in *Vitale* that, on certain hypothetical facts, the petitioner would have a "substantial" "claim" of double jeopardy on a *Grady*-type theory, see *post*, at 756–757, into a *holding* that the petitioner would win on that theory. *Post*, at 757, 763. No Justice, the *Vitale* dissenters included, has ever construed this passage as answering, rather than simply raising, the question on which we later granted certiorari in *Grady*. See 447 U. S., at 426 (STEVENS, J., dissenting) (in addition to finding the same-conduct claim "substantial," dissent would find it "dispositive"). See also *Grady*, 495 U. S., at 510 (*Vitale* "suggested" same-conduct test adopted in *Grady*).

In contrast to the above-discussed dicta relied upon by JUSTICE SOUTER, there are two pre-*Grady* (*and* post-*Nielsen*) cases that are directly on point. In both *Gavieres* v. *United States*, 220 U. S., at 343, and *Burton* v. *United States*, 202 U. S. 344, 379–381 (1906), the Court upheld subse-

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[11] There is, for example, no other way to read the following passage in *Illinois* v. *Vitale*, quoted by JUSTICE SOUTER, *post*, at 757: "[In *Harris*] we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." 447 U. S. 410, 420 (1980).

quent prosecutions after concluding that the *Blockburger* test (and *only* the *Blockburger* test) was satisfied.[12] These cases are incompatible with the belief that *Nielsen* had created an additional requirement beyond the "elements" standard.[13] Totally ignored by JUSTICE SOUTER are the

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[12] JUSTICE SOUTER contends that *Burton* is not in point because the case arose on a demurrer to the indictment, so that the Court "was not presented with the factual basis for the charges." *Post*, at 758. It would be a rare and unsatisfactory indictment that did not set forth the factual basis for the charges. The Court in *Burton* discusses the facts at length. 202 U. S., at 379–381. It is obvious, and it was assumed by the Court, that the same conduct was at issue in both indictments. Having decided, pursuant to *Blockburger*, that the nature of the statutes did not support a claim of double jeopardy, the Court (if it agreed with JUSTICE SOUTER's view of the law) should have proceeded to consider whether the nature of the acts alleged supported such a claim.

[13] Both JUSTICE WHITE, *post*, at 735, and JUSTICE SOUTER, *post*, at 758–759, recognize that *Gavieres* did hold that *Blockburger* is the only test for "same offence." JUSTICE SOUTER handles this difficulty by simply ignoring the concession. See *ibid.* JUSTICE WHITE first minimizes the concession, arguing that application of our version of *Blockburger* to successive prosecutions has happened (by reason of *Gavieres*) "only once." *Post*, at 735. Once, it seems to us, is enough to make a precedent. JUSTICE WHITE then seeks to neutralize the precedent by offering still another case, *Grafton* v. *United States*, 206 U. S. 333 (1907), that cannot support the reading grafted onto it today. *Post*, at 739–740. The defendant in *Grafton* was first tried and acquitted by a military court for the offense of homicide, and then tried by a civilian criminal court for assassination, and convicted of homicide, based on the same conduct. 206 U. S., at 349. The second prosecution was held barred by the Double Jeopardy Clause. JUSTICE WHITE argues that, just as Grafton had to be a soldier for the military court to have jurisdiction, so too here the only relevance of the CPO is that it gave the court authority to punish offenses "already prescribed by the criminal law." *Post*, at 740. This description does not accurately portray the threat counts, see n. 8, *supra*—but the problem with JUSTICE WHITE's analysis is deeper than that. The substantive offense for which Grafton was first tried (violation of Philippines Penal Code Article 404) did *not* have as one of its elements status as a soldier, whereas the substantive offense for which Foster was first tried *did* have as one of its elements knowledge of an extant CPO. See *supra*, at 700–702. Since military status was not an element of Grafton's charged offense, it is not

many early American cases construing the Double Jeopardy Clause, which support only an "elements" test. See *Grady*, *supra*, at 533–535 (SCALIA, J., dissenting).[14]

But *Grady* was not only wrong in principle; it has already proved unstable in application. Less than two years after it came down, in *United States* v. *Felix*, 503 U. S. 378 (1992), we were forced to recognize a large exception to it. There we concluded that a subsequent prosecution for conspiracy to manufacture, possess, and distribute methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance. We offered as a justification for avoiding a "literal" (*i. e.*, faithful) reading of *Grady* "longstanding authority" to the effect that prosecution for conspiracy is not precluded by prior prosecution for the substantive offense. *Felix*, *supra*, at 388–391. Of course the very existence of such a large and longstanding "exception" to the

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true that our analysis would produce a result contrary to the opinion in *Grafton*. Under the traditional *Blockburger* elements test, assassination, as defined in Article 403 of the Philippines Penal Code, contained an element that homicide, as defined in Article 404, did not; but, as the Court noted, homicide did not contain any element not included in assassination. 206 U. S., at 350 ("One crime may be a constituent part of the other"); accord, *id.*, at 355 (he "could not subsequently be tried for the same offense"). Grafton could therefore not later be prosecuted for assassination, much less later be convicted for the very same homicide offense of which he had been acquitted. (In fact, *Grafton* may simply have been decided on grounds of collateral estoppel, see *id.*, at 349–351, an issue that we specifically decline to reach in this case, see n. 17, *infra*.)

[14] It is unclear what definition of "same offence" JUSTICE SOUTER would have us adopt for successive prosecution. At times, he appears content with our having added to *Blockburger* the *Grady* same-conduct test. At other times, however, he adopts an *ultra-Grady* "same transaction" rule, which would require the Government to try together all offenses (regardless of the differences in the statutes) based on one event. See *post*, at 747, 761. Of course, the same-transaction test, long espoused by Justice Brennan, see, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 170 (1977) (concurring opinion), has been consistently rejected by the Court. See, *e. g.*, *Garrett* v. *United States*, 471 U. S. 773, 790 (1985).

Grady rule gave cause for concern that the rule was not an accurate expression of the law. This "past practice" excuse is not available to support the ignoring of *Grady* in the present case, since there is no Supreme Court precedent even discussing this fairly new breed of successive prosecution (criminal contempt for violation of a court order prohibiting a crime, followed by prosecution for the crime itself).

A hypothetical based on the facts in *Harris* reinforces the conclusion that *Grady* is a continuing source of confusion and must be overruled. Suppose the State first tries the defendant for felony murder, based on robbery, and then indicts the defendant for robbery with a firearm in the same incident. Absent *Grady*, our cases provide a clear answer to the double jeopardy claim in this situation. Under *Blockburger*, the second prosecution is not barred—as it clearly was not barred at common law, as a famous case establishes. In *King* v. *Vandercomb*, 2 Leach. 708, 717, 168 Eng. Rep. 455, 460 (K. B. 1796), the government abandoned, midtrial, prosecution of defendant for burglary by breaking and entering and stealing goods, because it turned out that no property had been removed on the date of the alleged burglary. The defendant was then prosecuted for burglary by breaking and entering with intent to steal. That second prosecution was allowed, because "these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other." *Ibid.* Accord, English and American cases cited in *Grady*, 495 U. S., at 532–535 (SCALIA, J., dissenting).[15]

[15] JUSTICE SOUTER dislikes this result because it violates "the principles behind the protection from successive prosecutions included in the Fifth Amendment." *Post*, at 761. The "principles behind" the Fifth Amendment are more likely to be honored by following longstanding practice than by following intuition. But in any case, JUSTICE SOUTER's concern that prosecutors will bring separate prosecutions in order to perfect their case seems unjustified. They have little to gain and much to lose from such a strategy. Under *Ashe* v. *Swenson*, 397 U. S. 436 (1970), an acquittal

Having encountered today yet another situation in which the pre-*Grady* understanding of the Double Jeopardy Clause allows a second trial, though the "same-conduct" test would not, we think it time to acknowledge what is now, three years after *Grady*, compellingly clear: The case was a mistake. We do not lightly reconsider a precedent, but, because *Grady* contradicted an "unbroken line of decisions," contained "less than accurate" historical analysis, and has produced "confusion,"[16] we do so here. *Solorio* v. *United States*, 483 U. S.

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in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time. Surely, moreover, the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources. Finally, even if JUSTICE SOUTER's fear were well founded, no double jeopardy bar short of a same-transaction analysis will eliminate this problem; but that interpretation of the Double Jeopardy Clause has been soundly rejected, see, *e. g.*, *Garrett*, *supra*, and would require overruling numerous precedents, the latest of which is barely a year old, *United States* v. *Felix*, 503 U. S. 378 (1992).

[16] See, *e. g.*, *Sharpton* v. *Turner*, 964 F. 2d 1284, 1287 (CA2) (*Grady* formulation "has proven difficult to apply" and "whatever difficulties we have previously encountered in grappling with the *Grady* language have not been eased by" *Felix*), cert. denied, 506 U. S. 986 (1992); *Ladner* v. *Smith*, 941 F. 2d 356, 362, 364 (CA5 1991) (a divided court adopts a four-part test for application of *Grady* and notes that *Grady*, "even if carefully analyzed and painstakingly administered, is not easy to apply"), cert. denied, 503 U. S. 983 (1992); *United States* v. *Calderone*, 917 F. 2d 717 (CA2 1990) (divided court issues three opinions construing *Grady*), vacated and remanded, 503 U. S. 978 (1992) (remanded for consideration in light of *Felix*); *United States* v. *Prusan*, 780 F. Supp. 1431, 1434–1436 (SDNY 1991) ("[T]he lower courts have had difficulty discerning the precise boundaries of the *Grady* standard, and the circuits have not applied uniformly the 'same conduct' test"), rev'd, 967 F. 2d 57 (CA2), cert. denied *sub nom.* *Vives* v. *United States*, 506 U. S. 987 (1992); *State* v. *Woodfork*, 239 Neb. 720, 725, 478 N. W. 2d 248, 252 (1991) (divided court overrules year-old precedent construing *Grady*, because it was a "misapplication" of *Grady*); *Eatherton* v. *State*, 810 P. 2d 93, 99, 104 (Wyo. 1991) (majority states that

435, 439, 442, 450 (1987). Although *stare decisis* is the "preferred course" in constitutional adjudication, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991) (quoting *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944), and collecting examples). We would mock *stare decisis* and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not. We therefore accept the Government's invitation to overrule *Grady*, and Counts II, III, IV, and V of Foster's subsequent prosecution are not barred.[17]

V

Dixon's subsequent prosecution, as well as Count I of Foster's subsequent prosecution, violate the Double Jeopardy Clause.[18] For the reasons set forth in Part IV, the other counts of Foster's subsequent prosecution do not violate the Double Jeopardy Clause.[19] The judgment of the District of Columbia Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

"[t]he Supreme Court did not really develop any new law in *Grady* with respect to successive prosecutions," while dissent concludes that *Grady* requires reversal). Commentators have confirmed that *Grady* contributed confusion rather than certainty. See Poulin, Double Jeopardy Protection against Successive Prosecutions in Complex Criminal Cases: A Model, 25 Conn. L. Rev. 95 (1992); Thomas, A Modest Proposal to Save the Double Jeopardy Clause, 69 Wash. U. L. Q. 195 (1991).

[17] We do not address the motion to dismiss the threat counts based on collateral estoppel, see *Ashe* v. *Swenson*, *supra*, because neither lower court ruled on that issue.

[18] JUSTICES WHITE, STEVENS, and SOUTER concur in this portion of the judgment.

[19] JUSTICE BLACKMUN concurs only in the judgment with respect to this portion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring in part and dissenting in part.

Respondent Alvin Dixon possessed cocaine with intent to distribute it. For that he was held in contempt of court for violating a condition of his bail release. He was later criminally charged for the same conduct with possession with intent to distribute cocaine. Respondent Michael Foster assaulted and threatened his estranged wife. For that he was held in contempt of court for violating a civil protection order entered in a domestic relations proceeding. He was later criminally charged for the same conduct with assault, threatening to injure another, and assault with intent to kill.

The Court today concludes that the Double Jeopardy Clause prohibits the subsequent prosecutions of Foster for assault and Dixon for possession with intent to distribute cocaine, but does not prohibit the subsequent prosecutions of Foster for threatening to injure another or for assault with intent to kill. After finding that at least some of the charges here are not prohibited by the "same-elements" test set out in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), the Court goes on to consider whether there is a double jeopardy bar under the "same-conduct" test set out in *Grady* v. *Corbin*, 495 U. S. 508, 510 (1990), and determines that there is. However, because the same-conduct test is inconsistent with the text and history of the Double Jeopardy Clause, was a departure from our earlier precedents, and has proven difficult to apply, the Court concludes that *Grady* must be overruled. I do not join Part III of JUSTICE SCALIA's opinion because I think that none of the criminal prosecutions in this case were barred under *Blockburger*. I must then confront the expanded version of double jeopardy embodied in *Grady*. For the reasons set forth in the dissent in *Grady*, *supra*, at 526 (opinion of SCALIA, J.), and in Part IV of the Court's opinion, I, too, think that *Grady* must be overruled. I

therefore join Parts I, II, and IV of the Court's opinion, and write separately to express my disagreement with JUSTICE SCALIA's application of *Blockburger* in Part III.

In my view, *Blockburger*'s same-elements test requires us to focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense. Relying on *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), a three-paragraph *per curiam* in an unargued case, JUSTICE SCALIA concludes otherwise today, and thus incorrectly finds in Part III–A of his opinion that the subsequent prosecutions of Dixon for drug distribution and of Foster for assault violated the Double Jeopardy Clause. In so doing, JUSTICE SCALIA rejects the traditional view—shared by every Federal Court of Appeals and State Supreme Court that addressed the issue prior to *Grady*—that, as a general matter, double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt. I cannot subscribe to a reading of *Harris* that upsets this previously well-settled principle of law. Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under *Blockburger*. I would therefore limit *Harris* to the context in which it arose: where the crimes in question are analogous to greater and lesser included offenses. The crimes at issue here bear no such resemblance.

JUSTICE SCALIA dismisses out-of-hand, see *ante*, at 699, the Government's reliance on several statements from our prior decisions. See *In re Debs*, 158 U. S. 564, 594, 599–600 (1895); *In re Chapman*, 166 U. S. 661, 672 (1897); *Jurney* v. *MacCracken*, 294 U. S. 125, 151 (1935). Those statements are dicta, to be sure, and thus not binding on us as *stare decisis*. Yet they are still significant in that they reflect the unchallenged contemporaneous view among all courts that the Double Jeopardy Clause does not prohibit separate prosecutions for contempt and a substantive offense based

on the same conduct.[1] This view, which dates back to the English common law, see F. Wharton, Criminal Pleading and Practice § 444, p. 300 (8th ed. 1880), has prevailed to the present day. See generally 21 Am. Jur. 2d, Criminal Law § 250, p. 446 (1981). In fact, every Federal Court of Appeals and state court of last resort to consider the issue before *Grady* agreed that there is no double jeopardy bar to successive prosecutions for criminal contempt and substantive criminal offenses based on the same conduct. See, *e. g.*, *Hansen* v. *United States*, 1 F. 2d 316, 317 (CA7 1924); *Orban* v. *United States*, 18 F. 2d 374, 375 (CA6 1927); *State* v. *Sammons*, 656 S. W. 2d 862, 868–869 (Tenn. Crim. App. 1982); *Commonwealth* v. *Allen*, 506 Pa. 500, 511–516, 486 A. 2d 363, 368–371 (1984), cert. denied, 474 U. S. 842 (1985); *People* v. *Totten*, 118 Ill. 2d 124, 134–139, 514 N. E. 2d 959, 963–965 (1987).[2] It is somewhat ironic, I think, that JUSTICE SCALIA today adopts a view of double jeopardy that did not come to the fore until after *Grady*, a decision which he (for the Court) goes on to emphatically reject as "lack[ing] constitutional roots." *Ante*, at 704.

At the heart of this pre-*Grady* consensus lay the common belief that there was no double jeopardy bar under *Blockburger*. There, we stated that two offenses are different for

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[1] JUSTICE SCALIA suggests that the dicta in those earlier cases are of limited value in light of *Bloom* v. *Illinois*, 391 U. S. 194 (1968), which held that the Sixth Amendment right to a jury trial applies to nonsummary contempt prosecutions. But there is simply no reason to think that the dicta in those cases were based on the understanding that prosecutions for contempt were not subject to the Double Jeopardy Clause. Rather, the principal theme running through the pre-*Grady* cases is that, while nonsummary contempt is a criminal prosecution, that prosecution and the later one for a substantive offense involve two separate and distinct offenses.

[2] The Court's discussion of the use of the contempt power at common law and in 19th-century America, see *ante*, at 694–695, does not undercut the relevance of these later, pre-*Grady* decisions—most of which are from the late 20th century—to the instant case.

purposes of double jeopardy if "each *provision* requires proof of a fact which the other does not." 284 U. S., at 304 (emphasis added). Applying this test to the offenses at bar, it is clear that the elements of the governing contempt *provision* are entirely different from the elements of the substantive crimes. Contempt of court comprises two elements: (i) a court order made known to the defendant, followed by (ii) willful violation of that order. *In re Gorfkle*, 444 A. 2d 934, 939 (D. C. 1982); *In re Thompson*, 454 A. 2d 1324, 1326 (D. C. 1982). Neither of those elements is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court.

JUSTICE SCALIA grounds his departure from *Blockburger*'s customary focus on the statutory elements of the crimes charged on *Harris* v. *Oklahoma*, *supra*, an improbable font of authority. See *ante*, at 698. A summary reversal, like *Harris*, "does not enjoy the full precedential value of a case argued on the merits." *Connecticut* v. *Doehr*, 501 U. S. 1, 12, n. 4 (1991); accord, *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Today's decision shows the pitfalls inherent in reading too much into a "terse *per curiam*." *Ante*, at 698. JUSTICE SCALIA's discussion of *Harris* is nearly as long as *Harris* itself and consists largely of a quote, not from *Harris*, but from a subsequent opinion analyzing *Harris*. JUSTICE SCALIA then concludes that *Harris* somehow requires us to look to the facts that must be proved under the particular court orders in question (rather than under the general law of criminal contempt) in determining whether contempt and the related substantive offenses are the same for double jeopardy purposes. This interpretation of *Harris* is both unprecedented and mistaken.

Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not

on the facts that must be proved under the particular indictment at issue—an indictment being the closest analogue to the court orders in this case. See, *e. g.*, *Grady*, 495 U. S., at 528 (SCALIA, J., dissenting) ("Th[e] test focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction"); *Albernaz* v. *United States*, 450 U. S. 333, 338 (1981) (" '[T]he Court's application of the test focuses on the statutory elements of the offense' " (quoting *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975))); *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)* (looking to the statutory elements of the offense in applying *Blockburger*). By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of the crime of contempt of court, JUSTICE SCALIA's double jeopardy analysis bears a striking resemblance to that found in *Grady*—not what one would expect in an opinion that overrules *Grady*.

Close inspection of the crimes at issue in *Harris* reveals, moreover, that our decision in that case was not a departure from *Blockburger*'s focus on the *statutory* elements of the offenses charged. In *Harris*, we held that a conviction for felony murder based on a killing in the course of an armed robbery foreclosed a subsequent prosecution for robbery with a firearm. Though the felony-murder statute in *Harris* did not require proof of armed robbery, it did include as an element proof that the defendant was engaged in the commission of *some* felony. *Harris* v. *State*, 555 P. 2d 76, 80 (Okla. Crim. App. 1976). We construed this generic reference to some felony as incorporating the statutory elements of the various felonies upon which a felony-murder conviction could rest. Cf. *Whalen* v. *United States*, 445 U. S. 684, 694 (1980). The criminal contempt provision involved here, by contrast, contains no such generic reference which by definition incorporates the statutory elements of assault or drug distribution.

Unless we are to accept the extraordinary view that the three-paragraph *per curiam* in *Harris* was intended to overrule *sub silentio* our previous decisions that looked to the statutory elements of the offenses charged in applying *Blockburger*, we are bound to conclude, as does JUSTICE SCALIA, see *ante*, at 698, that the *ratio decidendi* of our *Harris* decision was that the two crimes there were akin to greater and lesser included offenses. The crimes at issue here, however, cannot be viewed as greater and lesser included offenses, either intuitively or logically. A crime such as possession with intent to distribute cocaine is a serious felony that cannot easily be conceived of as a lesser included offense of criminal contempt, a relatively petty offense as applied to the conduct in this case. See D. C. Code Ann. § 33–541(a)(2)(A) (Supp. 1992) (the maximum sentence for possession with intent to distribute cocaine is 15 years in prison). Indeed, to say that criminal contempt is an aggravated form of that offense defies common sense. Even courts that have found a double jeopardy bar in cases resembling this one have appreciated how counterintuitive that notion is. *E. g.*, *United States* v. *Haggerty*, 528 F. Supp. 1286, 1297 (Colo. 1981).

But there is a more fundamental reason why the offenses in this case are not analogous to greater and lesser included offenses. A lesser included offense is defined as one that is "necessarily included" within the statutory elements of another offense. See Fed. Rule Crim. Proc. 31(c); *Schmuck* v. *United States*, 489 U. S. 705, 716–717 (1989). Taking the facts of *Harris* as an example, a defendant who commits armed robbery necessarily has satisfied one of the statutory elements of felony murder. The same cannot be said, of course, about this case: A defendant who is guilty of possession with intent to distribute cocaine or of assault has not necessarily satisfied any statutory element of criminal contempt. Nor, for that matter, can it be said that a defendant who is held in criminal contempt has necessarily satisfied any

element of those substantive crimes. In short, the offenses for which Dixon and Foster were prosecuted in this case cannot be analogized to greater and lesser included offenses; hence, they are separate and distinct for double jeopardy purposes.[3]

The following analogy, raised by the Government at oral argument, see Tr. of Oral Arg. 8–9, helps illustrate the absurd results that JUSTICE SCALIA's *Harris/Blockburger* analysis could in theory produce. Suppose that the offense in question is failure to comply with a lawful order of a police officer, see, *e. g.*, Ind. Code § 9–21–8–1 (Supp. 1992), and that the police officer's order was, "Don't shoot that man." Under JUSTICE SCALIA's flawed reading of *Harris*, the elements of the offense of failure to obey a police officer's lawful order would include, for purposes of *Blockburger*'s same-elements test, the elements of, perhaps, murder or manslaughter, in effect converting those felonies into a lesser included offense of the crime of failure to comply with a lawful order of a police officer.

In sum, I think that the substantive criminal prosecutions in this case, which followed convictions for criminal con-

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[3] Assuming, *arguendo*, that JUSTICE SCALIA's reading of *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), is accurate, and that we must look to the terms of the particular court orders involved, I believe JUSTICE SCALIA is correct in differentiating among the various counts in *Foster*. The court order there provided that Foster must "'not molest, assault, or in any manner threaten or physically abuse'" his estranged wife. App. to Pet. for Cert. 4a. For Foster to be found in contempt of court, his wife need have proved only that he had knowledge of the court order and that he assaulted or threatened her, but not that he assaulted her with intent to kill (Count V) or that he threatened to inflict bodily harm (Counts II–IV). So the crime of criminal contempt in *Foster*, even if analyzed under JUSTICE SCALIA's reading of *Harris*, is nonetheless a different offense under *Blockburger* v. *United States*, 284 U. S. 299 (1932), than the crimes alleged in Counts II–V of the indictment, since "each provision requires proof of a fact which the other does not." *Id.*, at 304. Because JUSTICE SCALIA finds no double jeopardy bar with respect to those counts, I agree with the result reached in Part III–B of his opinion.

tempt, did not violate the Double Jeopardy Clause, at least before our decision in *Grady*. Under *Grady*, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U. S., at 510. As the Court points out, see *ante*, at 703–704, this case undoubtedly falls within that expansive formulation: To secure convictions on the substantive criminal charges in this case, the Government will have to prove conduct that was the basis for the contempt convictions. Forced, then, to confront *Grady*, I join the Court in overruling that decision.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER joins as to Part I, concurring in the judgment in part and dissenting in part.

I am convinced that the Double Jeopardy Clause bars prosecution for an offense if the defendant already has been held in contempt for its commission. Therefore, I agree with the Court's conclusion that both Dixon's prosecution for possession with intent to distribute cocaine and Foster's prosecution for simple assault were prohibited. In my view, however, JUSTICE SCALIA's opinion gives short shrift to the arguments raised by the United States. I also am uncomfortable with the reasoning underlying this holding, in particular the application of *Blockburger* v. *United States*, 284 U. S. 299 (1932), to the facts of this case, a reasoning that betrays an overly technical interpretation of the Constitution. As a result, I concur only in the judgment in Part III–A.

The mischief in the Court's approach is far more apparent in the second portion of today's decision. Constrained by its narrow reading of the Double Jeopardy Clause, it asserts that the fate of Foster's remaining counts depends on *Grady* v. *Corbin*, 495 U. S. 508 (1990), which the Court then chooses

to overrule. *Ante*, at 704. I do not agree. Resolution of the question presented by Foster's case no more requires reliance on *Grady* than it points to reasons for reversing that decision. Rather, as I construe the Clause, double jeopardy principles compel equal treatment of *all* of Foster's counts. I dissent from the Court's holding to the contrary. Inasmuch as *Grady* has been dragged into this case, however, I agree with JUSTICE BLACKMUN and JUSTICE SOUTER that it should not be overruled. *Post*, at 741, 744. From this aspect of the Court's opinion as well, I dissent.

I

The chief issue before us is whether the Double Jeopardy Clause applies at all to cases such as these. JUSTICE SCALIA finds that it applies, but does so in conclusory fashion, without dealing adequately with either the Government's arguments or the practical consequences of today's decision. Both, in my view, are worthy of more.

A

The position of the United States is that, for the purpose of applying the Double Jeopardy Clause, a charge of criminal contempt for engaging in conduct that is proscribed by court order and that is in turn forbidden by the criminal code is an offense separate from the statutory crime. The United States begins by pointing to prior decisions of this Court to support its view. Heavy reliance is placed on *In re Debs*, 158 U. S. 564 (1895), but, as the majority notes, see *ante*, at 699, the relevant portion of the opinion is dictum—and seriously weakened dictum at that. See *Bloom* v. *Illinois*, 391 U. S. 194 (1968).

The Government also relies on two cases involving Congress' power to punish by contempt a witness who refuses to testify before it, *In re Chapman*, 166 U. S. 661 (1897), and *Jurney* v. *MacCracken*, 294 U. S. 125 (1935). Both cases appear to lean in the Government's direction, but neither is conclu-

sive. First, the statements were dicta. The claim in *Jurney* and *Chapman* was that the power to punish for contempt and the power to punish for commission of the statutory offense could not coexist side by side. But in neither were both powers exercised; in neither case did the defendant face a realistic threat of twice being put in jeopardy. In fact, as the majority notes, *ante*, at 698–699, n. 2, the Court expressed doubt that consecutive prosecutions would be brought in such circumstances. See *Chapman*, *supra*, at 672.

Second, both decisions concern the power to deal with acts interfering *directly* with the performance of legislative functions, a power to which not all constitutional restraints on the exercise of judiciary authority apply. See *Marshall* v. *Gordon*, 243 U. S. 521, 547 (1917). The point, spelled out in *Marshall*, is this: In a case such as *Chapman*, where the contempt proceeding need not "resor[t] to the modes of trial required by constitutional limitations . . . for substantive offenses under the criminal law," 243 U. S., at 543, so too will it escape the prohibitions of the Double Jeopardy Clause. If, however, it is of such a character as to be subject to these constitutional restrictions, "those things which, as pointed out in *In re Chapman* . . . , were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other." *Id.*, at 547.

Marshall thus suggests that application of the Double Jeopardy Clause, like that of other constitutional guarantees, is a function of the type of contempt proceeding at issue. *Chapman*, it follows, cannot be said to control this case. Rather, whatever application *Chapman* (and, by implication, *Jurney*) might have in the context of judicial contempt is limited to cases of in-court contempts that constitute direct obstructions of the judicial process and for which summary

proceedings remain acceptable. Cf. *Marshall*, *supra*, at 543. Neither *Dixon* nor *Foster* is such a case.[1]

The United States' second, more powerful, argument is that contempt and the underlying substantive crime constitute two separate offenses for they involve injuries to two distinct interests, the one the interest of the court in preserving its authority, the other the public's interest in being protected from harmful conduct. This position finds support in JUSTICE BLACKMUN's partial dissent, see *post*, at 743, and is bolstered by reference to numerous decisions acknowledging the importance and role of the courts' contempt power. See, *e. g.*, *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 800 (1987); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 65 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450 (1911). It cannot lightly be dismissed. Indeed, we recognized in *Young*, *supra*, that contempt "proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that

[1] The distinction between, on the one hand, direct and summary contempt (*i. e.*, contempt for acts occurring in the courtroom and interfering with the orderly conduct of business), and, on the other, nonsummary contempt, possesses old roots in the Court's cases. See *United States* v. *Wilson*, 421 U. S. 309 (1975); *Cammer* v. *United States*, 350 U. S. 399 (1956); *Nye* v. *United States*, 313 U. S. 33, 47–52 (1941); *Cooke* v. *United States*, 267 U. S. 517, 537 (1925); *In re Savin*, 131 U. S. 267 (1889); *Ex parte Terry*, 128 U. S. 289 (1888). See also Fed. Rule Crim. Proc. 42(a). Significantly, some courts have relied on this division to allow retrial on substantive criminal charges after a *summary* contempt proceeding based on the same conduct. See, *e. g.*, *United States* v. *Rollerson*, 145 U. S. App. D. C. 338, 343, n. 13, 449 F. 2d 1000, 1005, n. 13 (1971); *United States* v. *Mirra*, 220 F. Supp. 361 (SDNY 1963). The argument goes as follows: Because summary proceedings do not really involve adversary proceedings, see *Cooke*, *supra*, they do not raise typical double jeopardy concerns and the defendant is not being subjected to successive trials. The instant cases deal exclusively with nonsummary contempt trials.

violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings." *Id.*, at 800.

The fact that two criminal prohibitions promote different interests may be indicative of legislative intent and, to that extent, important in deciding whether cumulative punishments imposed in a single prosecution violate the Double Jeopardy Clause. See *Missouri* v. *Hunter*, 459 U. S. 359, 366–368 (1983). But the cases decided today involve instances of successive prosecutions in which the interests of the *defendant* are of paramount concern. To subject an individual to repeated prosecutions exposes him to "embarrassment, expense and ordeal," *Green* v. *United States*, 355 U. S. 184, 187 (1957), violates principles of finality, *United States* v. *Wilson*, 420 U. S. 332, 343 (1975), and increases the risk of a mistaken conviction. That one of the punishments is designed to protect the court rather than the public is, in this regard, of scant comfort to the defendant.[2]

It is true that the Court has not always given primacy to the defendant's interest. In particular, the Government directs attention to the dual sovereignty doctrine under which, "[w]hen a defendant in a single act violates the 'peace

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[2] It also is worth noting that sentences for contumacious conduct can be quite severe. Under federal law, there is no statutory limit to the sentence that can be imposed in a jury-tried criminal contempt proceeding. See 18 U. S. C. § 401. The same is true in the District of Columbia. See D. C. Code Ann. § 11–944 (Supp. 1992); see also *Caldwell* v. *United States*, 595 A. 2d 961, 964–966 (D. C. 1991). Significantly, some courts have found no bar to the imposition of a prison sentence for contempt even where the court order that was transgressed was an injunction against violation of a statute that itself did not provide for imprisonment as a penalty. See, *e. g.*, *United States* v. *Quade*, 563 F. 2d 375, 379 (CA8 1977), cert. denied, 434 U. S. 1064 (1978); *Mitchell* v. *Fiore*, 470 F. 2d 1149, 1154 (CA3 1972), cert. denied, 411 U. S. 938 (1973); *United States* v. *Fidanian*, 465 F. 2d 755, 757–758 (CA5), cert. denied, 409 U. S. 1044 (1972).

and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985) (quoting *United States* v. *Lanza*, 260 U. S. 377, 382 (1922)). See also *United States* v. *Wheeler*, 435 U. S. 313, 317 (1978); *Moore* v. *Illinois*, 14 How. 13, 19 (1852).

But the dual sovereignty doctrine is limited, by its own terms, to cases where "the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." *Heath*, 474 U. S., at 88. "This determination," we explained, "turns on whether the two entities draw their authority to punish the offender from distinct sources of power," *ibid.*, not on whether they are pursuing separate interests. Indeed, the Court has rejected the United States' precise argument in the past, perhaps nowhere more resolutely than in *Grafton* v. *United States*, 206 U. S. 333 (1907). In that case, the defendant, a private in the United States Army stationed in the Philippines, was tried before a general court-martial for homicide. Subsequent to Grafton's acquittal, the United States filed a criminal complaint in civil court based on the same acts. Seeking to discredit the view that the Double Jeopardy Clause would be violated by this subsequent prosecution, the Government asserted that "Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed." *Id.*, at 351. To which the Court responded:

> "Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. . . . If, therefore, a person be tried for an offense in a tribunal deriv-

> ing its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. . . . [T]he same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb." *Id.*, at 352.

Grafton, and the principle it embodies, are controlling. The Superior Court and the District of Columbia Court of Appeals were created by Congress, pursuant to its power under Article I of the Constitution. See *Palmore* v. *United States*, 411 U. S. 389 (1973). In addition, the specific power exercised by the courts in this case were bestowed by the Legislature. See *ante*, at 691. As we observed in *United States* v. *Providence Journal Co.*, 485 U. S. 693 (1988), "[t]he fact that the allegedly criminal conduct concerns a violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States." *Id.*, at 700. It is past dispute, in other words, that "the two tribunals that tried the accused exert all their powers under and by the authority of the same government—that of the United States," *Grafton*, *supra*, at 355, and, therefore, that the dual

sovereignty doctrine poses no problem. Cf. *Heath*, *supra*, at 88.[3]

B

Both the Government and *amici* submit that application of the Double Jeopardy Clause in this context carries grave practical consequences. See also *post*, at 742–743 (BLACKMUN, J., concurring in judgment in part and dissenting in part). It would, it is argued, cripple the power to enforce court orders or, alternatively, allow individuals to escape serious punishment for statutory criminal offenses. The argument, an offshoot of the principle of necessity familiar to the law of contempt, see, *e. g.*, *United States* v. *Wilson*, 421 U. S. 309, 315–318 (1975), is that, just as we have relaxed certain procedural requirements in contempt proceedings where time is of the essence and an immediate remedy is needed to "prevent a breakdown of the proceedings," *id.*, at 319, so too should we exclude double jeopardy protections from this setting lest we do damage to the courts' authority. In other words, "[t]he ability to punish disobedience to judicial orders [being] regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority," *Young*, 481 U. S., at 796, its exercise should not be inhibited by fear that it might immunize defendants from subsequent criminal prosecution.

Adherence to double jeopardy principles in this context, however, will not seriously deter the courts from taking appropriate steps to ensure that their authority is not flouted.

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[3] That the contempt proceeding was brought and prosecuted by a private party in *Foster* is immaterial. For "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in *Gompers*, criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant . . . .' 221 U. S., at 445." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 804 (1987).

Courts remain free to hold transgressors in contempt and punish them as they see fit. The Government counters that this possibility will prove to be either illusory—if the prosecuting authority declines to initiate proceedings out of fear that they could jeopardize more substantial punishment for the underlying crime—or too costly—if the prosecuting authority, the risk notwithstanding, chooses to go forward. But it is not fanciful to imagine that judges and prosecutors will select a third option, which is to ensure, where necessary or advisable, that the contempt and the substantive charge be tried at the same time, in which case the double jeopardy issue "would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U. S. 435, 450 (1989). Indeed, the Court recently exercised its supervisory power to suggest that a federal court "ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." *Young*, 481 U. S., at 801. Just as "[i]n practice, courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution," *ibid.*, so too can the public prosecutor reasonably anticipate that the court will agree to some delay if needed to bring the two actions together.

Against this backdrop, the appeal of the principle of necessity loses much of its force. Ultimately, the urgency of punishing such contempt violations is no less, but by the same token no more, than that of punishing violations of criminal laws of general application—in which case, we simply do not question the defendant's right to the "protections worked out carefully over the years and deemed fundamental to our system of justice," *Bloom* v. *Illinois*, 391 U. S., at 208, including the protection of the Double Jeopardy Clause. "Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice . . . has been made, and retained, in the Consti-

tution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt." *Id.*, at 209.[4]

Dixon aptly illustrates these points. In that case, the motion requesting modification of the conditions of Dixon's release was filed by the Government, the same entity responsible for prosecution of the drug offense. Indeed, in so doing it relied explicitly on the defendant's indictment on the cocaine charge. 598 A. 2d 724, 728 (D. C. 1991). Logically, any problem of coordination or of advance notice of the impending prosecution for the substantive offense was at most minimal. Nor, aside from the legitimate desire to punish *all* offenders swiftly, does there appear to have been any real need to hold Dixon in contempt immediately, without waiting for the second trial. By way of comparison, at the time of his drug offense Dixon was awaiting trial for second-degree murder, a charge that had been brought some 11 months earlier.

Besides, in the situation where a person has violated a condition of release, there generally exist a number of alternatives under which the defendant's right against being put twice in jeopardy for the same offense could be safeguarded, while ensuring that disregard of the court's authority not go unsanctioned. To the extent that they are exercised with due regard for the Constitution, such options might include modification of release conditions or revocation of bail and detention.[5] As respondents acknowledge, these solutions

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[4] Like JUSTICE SCALIA, I take no position as to the application of the Double Jeopardy Clause to conduct warranting summary contempt proceedings. See *ante*, at 697, n. 1. In different circumstances, the Court has recognized exceptions to the policy of avoiding multiple trials where "'there is a manifest necessity.'" *United States* v. *Wilson*, 420 U. S. 332, 344 (1975) (quoting *United States* v. *Perez*, 9 Wheat. 579, 580 (1824)).

[5] The laws of different jurisdictions make such alternatives more or less available but that, of course, can have no bearing on the constitutional requirements we recognize today. In the District of Columbia, D. C. Code Ann. § 23–1329 (1989) contemplates both revocation of release and an order of detention in the event a condition of release has been violated. Also,

would raise no double jeopardy problem. See Tr. of Oral Arg. 30.

More difficult to deal with are the circumstances surrounding Foster's defiance of the court order. Realization of the scope of domestic violence—according to the American Medical Association (AMA), "the single largest cause of injury to women," AMA, Five Issues in American Health 5 (1991)—has come with difficulty, and it has come late.

There no doubt are time delays in the operation of the criminal justice system that are frustrating; they even can be perilous when an individual is left exposed to a defendant's potential violence. That is true in the domestic context; it is true elsewhere as well. Resort to more expedient methods therefore is appealing, and in many cases permissible. Under today's decision, for instance, police officers retain the power to arrest for violation of a civil protection order. Where the offense so warrants, judges can haul the assailant before the court, charge him with criminal contempt, and hold him without bail. See *United States* v. *Salerno*, 481 U. S. 739 (1987); *United States* v. *Edwards*, 430 A. 2d 1321 (D. C. 1981). Also, cooperation between the government and parties bringing contempt proceedings can be achieved. The various actors might not have thought such cooperation necessary in the past; after today's decision, I suspect they will.[6]

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trial court judges possess the authority to modify pretrial bail. See D. C. Code Ann. §23–1321(f) (1989); *Clotterbuck* v. *United States*, 459 A. 2d 134 (D. C. 1983). Federal provisions are similar. Thus, 18 U. S. C. §3148(a) provides that "[a] person who has been released [pending trial], and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court."

[6] In response, *amici* emphasize that many motions are brought by women who proceed *pro se* and are not familiar with the minutiae of double jeopardy law. Brief for Ayuda et al. as *Amici Curiae* 26. The point is well taken. But the problem should be addressed by such means as adequately informing *pro se* litigants, not by disregarding the Double Jeopardy Clause.

Victims, understandably, would prefer to have access to a proceeding in which swift and expeditious punishment could be inflicted for that offense without prejudice to a subsequent full-blown criminal trial. The justification for such a system, however, has nothing to do with preventing disruption of a court's proceedings or even with vindicating its authority. While, under the principle of necessity, contempt proceedings have been exempted from some constitutional constraints, this was done strictly "to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." *Ex parte Hudgings*, 249 U. S. 378, 383 (1919). No such end being invoked here, the principle of necessity cannot be summoned for the sole purpose of letting contempt proceedings achieve what, under our Constitution, other criminal trials cannot.

II

If, as the Court agrees, the Double Jeopardy Clause cannot be ignored in this context, my view is that the subsequent prosecutions in both *Dixon* and *Foster* were impermissible as to *all* counts. I reach this conclusion because the offenses at issue in the contempt proceedings were either identical to, or lesser included offenses of, those charged in the subsequent prosecutions. JUSTICE SCALIA's contrary conclusion as to some of Foster's counts, which he reaches by exclusive focus on the formal elements of the relevant crimes, is divorced from the purposes of the constitutional provision he purports to apply. Moreover, the results to which this approach would lead are indefensible.

A

The contempt orders in *Foster* and *Dixon* referred in one case to the District's laws regarding assaults and threats, and, in the other, to the criminal code in its entirety. The prohibitions imposed by the court orders, in other words,

duplicated those already in place by virtue of the criminal statutes. Aside from differences in the sanctions inflicted, the distinction between being punished for violation of the criminal laws and being punished for violation of the court orders, therefore, is simply this: Whereas in the former case "the entire population" is subject to prosecution, in the latter such authority extends only to "those particular persons whose legal obligations result from their earlier participation in proceedings before the court." *Young*, 481 U. S., at 800, n. 10. But the *offenses* that are to be sanctioned in either proceeding must be similar, since the contempt orders incorporated, in full or in part, the criminal code.[7]

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[7] JUSTICE SCALIA disputes this description of the Civil Protection Order (CPO). He questions whether the word "'assault'" meant "'assault under § 22–504,'" *ante*, at 700, n. 3, but defers to the contempt court's interpretation, and notes that the parties have not challenged this point. *Ibid.* He also disagrees that the reference to "threats" was to threats "that violate the District's criminal laws." *Ante*, at 702–703, n. 8. Indeed, given the context—a "domestic situation"—he finds this construction "highly artificial." *Ibid.* But that, too, is how the court applying the court order appears to have understood it. Responding to the very argument made here by JUSTICE SCALIA—namely that the "context of domestic violence" somehow stretched the meaning of "threat," Tr. in Nos. IF–630–87, IF–631–87 (Aug. 8, 1988), p. 315—the court asserted that "in a criminal case, the defendant is entitled to more specific notice of the nature of the charge." *Id.*, at 316. Significantly, in acquitting Foster with respect to the threat allegedly made on November 12, 1987, the court stated that it was "not satisfied if those words as such, in spite of the context of this dispute, constitutes a *legal* threat." *Ibid.* (emphasis added). For the same reason that the court concluded that the word "assault" referred to the District's criminal provisions, it decided that the CPO's reference to "threats" was to "legal" threats—*i. e.*, threats as defined by the law. Moreover, I note that the Government's presentation of this case coincides with this view. See Brief for United States 26 (describing the order not to "assault or in any manner threaten" as "direct[ing] Foster . . . to refrain from engaging in criminal conduct").

In any event, even assuming that the prohibition in the court order referred to threats other than those already outlawed, that should not change the outcome of this case. The offense prohibited in the CPO—to threaten "in any manner"—at the very least is "an incident and part of,"

Thus, in this case, the offense for which Dixon was held in contempt was possession with intent to distribute drugs. Since he previously had been indicted for precisely the same offense, the double jeopardy bar should apply. In Foster's contempt proceeding, he was acquitted with respect to threats allegedly made on November 12, 1987, and March 26 and May 17, 1988. He was found in contempt of court for having committed the following offenses: Assaulting his wife on November 6, 1987, and May 21, 1988, and threatening her on September 17, 1987. 598 A. 2d, at 727; App. 42. The subsequent indictment charged Foster with simple assault on November 6, 1987 (Count I); threatening to injure another on or about November 12, 1987, and March 26 and May 17, 1988 (Counts II, III, and IV); and assault with intent to kill on or about May 21, 1988 (Count V). All of the offenses for which Foster was either convicted or acquitted in the contempt proceeding were similar to, or lesser included offenses of, those charged in the subsequent indictment. Because "the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense," *Brown* v. *Ohio*, 432 U. S. 161, 169 (1977); see also *Grafton*, 206 U. S., at 349–351, the second set of trials should be barred in their entirety.

B

Professing strict adherence to *Blockburger*'s so-called "same-elements" test, see *Blockburger* v. *United States*, 284 U. S. 299 (1932), JUSTICE SCALIA opts for a more circuitous approach. The elements of the crime of contempt, he reasons, in this instance are (1) the existence and knowledge of a court, or CPO; and (2) commission of the underlying substantive offense. See *ante*, at 701. Where the criminal conduct that forms the basis of the contempt order is identical to that charged in the subsequent trial, JUSTICE SCALIA

In re Nielsen, 131 U. S. 176, 187 (1889), the offense of criminal threat defined in § 22–2307. Therefore, for reasons explained below, prosecution for one should preclude subsequent prosecution for the other.

concludes, *Blockburger* forbids retrial. All elements of Foster's simple assault offense being included in his previous contempt offense, prosecution on that ground is precluded. *Ante*, at 700. The same is true of Dixon's drug offense. *Ibid.* I agree with this conclusion, though would reach it rather differently: Because in a successive prosecution case the risk is that a person will have to defend himself more than once against the same charge, I would have put to the side the CPO (which, as it were, triggered the court's authority to punish the defendant for acts already punishable under the criminal laws) and compared the substantive offenses of which respondents stood accused in both prosecutions.[8]

The significance of our disaccord is far more manifest where an element is added to the second prosecution. Under JUSTICE SCALIA's view, the double jeopardy barrier is then removed because each offense demands proof of an element the other does not: Foster's conviction for contempt requires proof of the existence and knowledge of a CPO, which conviction for assault with intent to kill does not; his conviction for assault with intent to kill requires proof of an intent to kill, which the contempt conviction did not. *Ante*, at 701. Finally, though he was acquitted in the contempt proceedings with respect to the alleged November 12, March 26, and May 17 threats, his conviction under the threat charge in the subsequent trial required the additional proof that the threat be to kidnap, to inflict bodily injury, or to damage property. *Ante*, at 702. As to these counts, and absent any collateral-estoppel problem, see *ante*, at 712,

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[8] Therefore, I obviously disagree with THE CHIEF JUSTICE's *Blockburger* analysis which would require overruling not only *Grady* v. *Corbin*, 495 U. S. 508 (1990), but, as JUSTICE SCALIA explains, *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), as well. See *ante*, at 698. At the very least, where conviction of the crime of contempt cannot be had without conviction of a statutory crime forbidden by court order, the Double Jeopardy Clause bars prosecution for the latter after acquittal or conviction of the former.

n. 17, JUSTICE SCALIA finds that the Constitution does not prohibit retrial.

The distinction drawn by JUSTICE SCALIA is predicated on a reading of the Double Jeopardy Clause that is abstracted from the purposes the constitutional provision is designed to promote. To focus on the statutory elements of a crime makes sense where *cumulative* punishment is at stake, for there the aim simply is to uncover legislative intent. The *Blockburger* inquiry, accordingly, serves as a means to determine this intent, as our cases have recognized. See *Missouri* v. *Hunter*, 459 U. S., at 368. But, as JUSTICE SOUTER shows, adherence to legislative will has very little to do with the important interests advanced by double jeopardy safeguards against *successive* prosecutions. *Post*, at 744. The central purpose of the Double Jeopardy Clause being to protect against vexatious multiple prosecutions, see *Hunter*, *supra*, at 365; *United States* v. *Wilson*, 420 U. S., at 343, these interests go well beyond the prevention of unauthorized punishment. The same-elements test is an inadequate safeguard, for it leaves the constitutional guarantee at the mercy of a legislature's decision to modify statutory definitions. Significantly, therefore, this Court has applied an inflexible version of the same-elements test only once, in 1911, in a successive prosecution case, see *Gavieres* v. *United States*, 220 U. S. 338 (1911), and has since noted that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Brown*, 432 U. S., at 166–167, n. 6. Rather, "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Ibid.*

Take the example of Count V in *Foster:* For all intents and purposes, the offense for which he was convicted in the contempt proceeding was his assault against his wife. The

majority, its eyes fixed on the rigid elements test, would have his fate turn on whether his subsequent prosecution charges "simple assault" or "assault with intent to kill." Yet, because the crime of "simple assault" is included within the crime of "assault with intent to kill," the reasons that bar retrial under the first hypothesis are equally present under the second: These include principles of finality, see *United States* v. *Wilson*, *supra*, at 343; protecting Foster from "embarrassment" and "expense," *Green* v. *United States*, 355 U. S., at 187; and preventing the Government from gradually fine-tuning its strategy, thereby minimizing exposure to a mistaken conviction, *id.*, at 188. See also *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982); *Arizona* v. *Washington*, 434 U. S. 497, 503–504 (1978); *supra*, at 724.

Analysis of the threat charges (Counts II–IV) makes the point more clearly still. In the contempt proceeding, it will be recalled, Foster was *acquitted* of the—arguably lesser included—offense of threatening "in any manner." As we have stated:

> "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal might have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U. S. 82, 91 (1978) (citation omitted).

To allow the Government to proceed on the threat counts would present precisely the risk of erroneous conviction the Clause seeks to avoid. That the prosecution had to establish the existence of the CPO in the first trial, in short, does not in any way modify the prejudice potentially caused to a defendant by consecutive trials.

To respond, as the majority appears to do, that concerns relating to the defendant's interests against repeat trials are

"unjustified" because prosecutors "have little to gain and much to lose" from bringing successive prosecutions and because "the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources," *ante*, at 710–711, n. 15, is to get things exactly backwards. The majority's prophesies might be correct, and double jeopardy might be a problem that will simply take care of itself. Not so, however, according to the Constitution, whose firm prohibition against double jeopardy cannot be satisfied by wishful thinking.

C

Further consequences—at once illogical and harmful—flow from JUSTICE SCALIA's approach.[9] I turn for illustration once more to Foster's assault case. In his second prosecution, the Government brought charges of assault with intent to kill. In the District of Columbia, Superior Court Criminal Rule 31(c)—which faithfully mirrors its federal counterpart, Federal Rule of Criminal Procedure 31(c)—provides that a "defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." This provision has been construed to require the jury to determine guilt of all lesser included offenses. See *Simmons* v. *United States*, 554 A. 2d 1167 (D. C. 1989). Specifically, "[a] defendant is entitled to a lesser-included offense instruction when (1) all elements of the lesser offense are included within the offense charged, and (2) there is a sufficient evidentiary basis for the lesser charge." *Rease* v. *United States*, 403 A. 2d 322, 328 (D. C. 1979) (citations omitted).

Simple assault being a lesser included offense of assault with intent to kill, cf. *Keeble* v. *United States*, 412 U. S. 205

[9] Similar results follow, of course, from THE CHIEF JUSTICE's interpretation of the Clause.

(1973), the jury in the second prosecution would in all likelihood receive instructions on the lesser offense and could find Foster guilty of simple assault. In short, while the Government cannot, under the Constitution, bring *charges* of simple assault, it apparently can, under the majority's interpretation, secure a *conviction* for simple assault, so long as it prosecutes Foster for assault with intent to kill. As I see it, Foster will have been put in jeopardy twice for simple assault.[10] The result is as unjustifiable as it is pernicious. It

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[10] JUSTICE SCALIA's dismissal of this concern is difficult to follow. As I understand it, he maintains that no double jeopardy problem exists because under *Blockburger* a conviction for assault would not be upheld. See *ante*, at 702, n. 7. I suppose that the judge could upon request instruct the jury on the lesser included offense and await its verdict; if it were to find Foster guilty of simple assault, the court could then vacate the conviction as violative of the Double Jeopardy Clause—or, barring that, Foster could appeal his conviction on that basis. The sheer oddity of this scenario aside, it falls short of providing Foster with the full constitutional protection to which he is entitled. A double jeopardy violation occurs at the inception of trial, which is why an order denying a motion to dismiss on double jeopardy grounds is immediately appealable. See *Abney* v. *United States*, 431 U. S. 651 (1977). As we explained in that case: "[T]he Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 660–661. In light of the lesser included offense instructions, and the associated risk of conviction for that offense, Foster would have to defend himself in his second trial once more against the charge of simple assault, thereby undergoing the "personal strain, public embarrassment, and expense of a criminal trial." *Id.*, at 661. Even if the conviction were set aside, he still would have "been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.*, at 662. Indeed, I would have imagined that JUSTICE SCALIA would agree. As he recently wrote: "Since the Double Jeopardy Clause protects the defendant from being 'twice put in jeopardy,' *i. e.*, made to stand trial . . . for the 'same offence,' it presupposes that sameness can be determined *before the second trial.* Otherwise, the Clause would have prohibited a second 'conviction' or 'sentence' for the same offense." *Grady*, 495 U. S., at 529 (dissenting opinion) (emphasis added). This double jeopardy predicament, of course, could be avoided by Foster's attorney *not* requesting the lesser included offense instructions to

stems, I believe, from a "hypertechnical and archaic approach," *Ashe* v. *Swenson*, 397 U. S. 436, 444 (1970).

"Archaic" might not quite be the word, for even as far back as 1907 the Court appeared to hold a more pragmatic view. Defendant's court-martial in *Grafton* was authorized under the 62d Article of War, pursuant to which Congress granted military courts the power to try "officers and soldiers" in time of peace "for any offense, not capital, which the civil law declares to be a crime against the public." 206 U. S., at 341–342, 348, 351. Grafton faced the following charge: "'In that Private Homer E. Grafton . . . being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Philippino . . . [and] Felix Villanueva, a Philippino.'" *Id.*, at 341. He was acquitted. *Id.*, at 342. Some three months later, Grafton was prosecuted in a civil criminal court. He was charged with the crime of "assassination," defined as a killing accompanied by any of the following: "(1) With treachery; (2) For price or promise of reward; (3) By means of flood, fire, or poison; (4) With deliberate premeditation; (5) With vindictiveness, by deliberately and inhumanly increasing the suffering of the person attacked." *Id.*, at 343. Grafton ultimately was found guilty of homicide, a lesser included offense. *Id.*, at 344.

To convict Grafton in the first proceeding, then, it had to be established that (1) he was an officer or a soldier, and (2) he unlawfully killed. In the civil tribunal, the prosecution was required to prove (1) the killing, and (2) some further element, as specified. Had Grafton been tried in 1993 rather than 1907, I suppose that an inflexible *Blockburger* test, which asks whether "each provision requires proof of a fact the other does not," 284 U. S., at 304, would uncover no double jeopardy problem. At the time, though, the Court looked at matters differently: Both trials being for the same killing, and "[t]he identity of the offenses [being] determined,

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which his client is entitled. But to place a defendant before such a choice hardly strikes me as a satisfactory resolution.

not by their grade, but by their nature," *id.*, at 350, prosecuting Grafton for assassination meant twice putting him in jeopardy for the same offense.

I would dispose of Foster's case in like fashion, and focus on what JUSTICE SCALIA overlooks: The interests safeguarded by the Double Jeopardy Clause, and the fact that Foster should not have to defend himself twice against the same charges. When the case is so viewed, the condition that Foster be subject to a contempt order as a practical matter is analogous to the condition that Grafton be a soldier, for it triggered the court's authority to punish offenses already prescribed by the criminal law. At that point, the relevant comparison for double jeopardy purposes should be between the offenses charged in the two proceedings.

III

Once it is agreed that the Double Jeopardy Clause applies in this context, the Clause, properly construed, both governs this case and disposes of the distinction between Foster's charges upon which JUSTICE SCALIA relies. I therefore see little need to draw *Grady* into this dispute. In any event, the United States itself has not attempted to distinguish between *Dixon* and *Foster* or between the charges of "assault" on the one hand and, on the other, "assault with intent to kill" and "threat to injure another." The issue was not raised before the Court of Appeals or considered by it, and it was neither presented in the petition for certiorari nor briefed by either party. Under these circumstances, it is injudicious to address this matter. See, *e. g.*, *Mazer* v. *Stein*, 347 U. S. 201, 206, n. 5 (1954); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

The majority nonetheless has chosen to consider *Grady* anew and to overrule it. I agree with JUSTICE BLACKMUN and JUSTICE SOUTER that such a course is both unwarranted and unwise. See *post*, at 741, 744. Hence, I dissent from the judgment overruling *Grady*.

IV

Believing that the Double Jeopardy Clause bars Foster's and Dixon's successive prosecutions on all counts, I would affirm the judgment of the District of Columbia Court of Appeals. I concur in the judgment of the Court in Part III–A, which holds that Dixon's subsequent prosecution and Count I of Foster's subsequent prosecution were barred. I disagree with JUSTICE SCALIA's application of *Blockburger* in Part III–B. From Part IV of the opinion, in which the majority decides tc overrule *Grady*, I dissent.

JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

I cannot agree that contempt of court is the "same offence" under the Double Jeopardy Clause as either assault with intent to kill or possession of cocaine with intent to distribute it. I write separately to emphasize two interrelated points.

I

I agree with JUSTICE SOUTER that "the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case." *Post*, at 756. I also share both his and JUSTICE WHITE's dismay that the Court so cavalierly has overruled a precedent that is barely three years old and that has proved neither unworkable nor unsound. I continue to believe that *Grady* v. *Corbin*, 495 U. S. 508 (1990), was correctly decided, and that the Double Jeopardy Clause prohibits a subsequent criminal prosecution where the proof required to convict on the later offense would require proving conduct that constitutes an offense for which a defendant already has been prosecuted.

If this were a case involving successive prosecutions under the substantive criminal law (as was true in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), *Illinois* v. *Vitale*, 447 U. S. 410 (1980), and *Grady*), I would agree that the Double Jeopardy

Clause could bar the subsequent prosecution. But we are concerned here with contempt of court, a special situation. We explained in *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987):

> "The fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,' [*Bloom* v. *Illinois*, 391 U. S. 194, 201 (1968)], does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. . . . That criminal procedure protections are now required in such prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings." *Id.*, at 799–800.

The purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order. This Court said nearly a century ago: "[A] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to." *In re Debs*, 158 U. S. 564, 596 (1895).

II

Contempt is one of the very few mechanisms available to a trial court to vindicate the authority of its orders. I fear that the Court's willingness to overlook the unique interests served by contempt proceedings not only will jeopardize the ability of trial courts to control those defendants under their supervision but will undermine their ability to respond effec-

tively to unmistakable threats to their own authority and to those who have sought the court's protection.

This fact is poignantly stressed by the *amici:*

> "[C]ontempt litigators and criminal prosecutors seek to further different interests. A battered woman seeks to enforce her private order to end the violence against her. In contrast, the criminal prosecutor is vindicating *society*'s interest in enforcing its criminal law. The two interests are not the same, and to consider the contempt litigator and the criminal prosecutor as one and the same would be to adopt an absurd fiction." Brief for Ayuda et al. as *Amici Curiae* 20 (emphasis in original).

Finally, I cannot so easily distinguish between "summary" and "nonsummary" contempt proceedings, *ante,* at 696–697, for the interests served in both are fundamentally similar. It is as much a "disruption of judicial process," *ante,* at 695, to disobey a judge's conditional release order as it is to disturb a judge's courtroom. And the interests served in vindicating the authority of the court are fundamentally different from those served by the prosecution of violations of the substantive criminal law. Because I believe that neither Dixon nor Foster would be "subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const., Amdt. 5, I would reverse the judgment of the District of Columbia Court of Appeals.

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, concurring in the judgment in part and dissenting in part.

While I agree with the Court as far as it goes in holding that a citation for criminal contempt and an indictment for violating a substantive criminal statute may amount to charges of the "same offence" for purposes of the Double Jeopardy Clause, U. S. Const., Amdt. 5, I cannot join the Court in restricting the Clause's reach and dismembering the protection against successive prosecution that the Constitu-

tion was meant to provide. The Court has read our precedents so narrowly as to leave them bereft of the principles animating that protection, and has chosen to overrule the most recent of the relevant cases, *Grady* v. *Corbin*, 495 U. S. 508 (1990), decided three years ago. Because I think that *Grady* was correctly decided, amounting merely to an expression of just those animating principles, and because, even if the decision had been wrong in the first instance, there is no warrant for overruling it now, I respectfully dissent. I join Part I of JUSTICE WHITE's opinion, and I would hold, as he would, both the prosecution of Dixon and the prosecution of Foster under all the counts of the indictment against him to be barred by the Double Jeopardy Clause.[1]

I

In providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const., Amdt. 5, the Double Jeopardy Clause protects against two distinct types of abuses. See *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969). It protects against being punished more than once for a single offense, or "multiple punishment." Where a person is being subjected to more than one sentence, the Double Jeopardy Clause ensures that he is not receiving for one offense more than the punishment authorized. The Clause also protects against being prosecuted for the same offense more than once, or "successive prosecution." "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction." *Ibid.* (footnotes omitted). The Clause functions in different ways in the two contexts, and the analysis applied to claims of successive prosecution differs from that employed to analyze claims of multiple punishment.

[1] Consequently, I concur in the Court's judgment with respect to Dixon's prosecution and the prosecution of Foster under Count I of the indictment against him.

II

In addressing multiple punishments, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977). Courts enforcing the federal guarantee against multiple punishment therefore must examine the various offenses for which a person is being punished to determine whether, as defined by the legislature, any two or more of them are the same offense. Over 60 years ago, this Court stated the test still used today to determine "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment," *id.*, at 166:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932).

The *Blockburger* test "emphasizes the elements of the two crimes." *Brown*, *supra*, at 166. Indeed, the determination whether two statutes describe the "same offence" for multiple punishment purposes has been held to involve only a question of statutory construction. We ask what the elements of each offense are as a matter of statutory interpretation, to determine whether the legislature intended "to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975). See, *e. g.*, *Brown*, *supra*, at 167–168 (noting, in applying *Blockburger*, that state courts "'have the final authority to interpret . . . [a] State's legislation'" (quoting *Garner* v. *Louisiana*, 368 U. S. 157, 169 (1961))). The Court has even gone so far as to say that the *Blockburger* test will not prevent multiple punishment where legislative intent to the contrary is clear, at least in

the case of state law. "Where . . . a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Missouri* v. *Hunter*, 459 U. S. 359, 368–369 (1983); see *Ohio* v. *Johnson*, 467 U. S. 493, 499, n. 8 (1984).[2]

With respect to punishment for a single act, the *Blockburger* test thus asks in effect whether the legislature meant it to be punishable as more than one crime. To give the government broad control over the number of punishments that may be meted out for a single act, however, is consistent with the general rule that the government may punish as it chooses, within the bounds contained in the Eighth and Fourteenth Amendments. With respect to punishment, those provisions provide the primary protection against excess. "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." *Johnson*, *supra*, at 499 (citations and footnote omitted).

III

The interests at stake in avoiding successive prosecutions are different from those at stake in the prohibition against multiple punishments, and our cases reflect this reality. The protection against successive prosecutions is the central protection provided by the Clause. A 19th-century case of this Court observed that "[t]he prohibition is not against being

[2] For purposes of this case I need express no view on this question, whether the proscription of punishment for state-law offenses that fail the *Blockburger* test can somehow be overcome by a clearly shown legislative intent that they be punished separately. See *Albernaz* v. *United States*, 450 U. S. 333, 344–345 (1981) (Stewart, J., concurring in judgment).

twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *United States* v. *Ball*, 163 U. S. 662, 669 (1896). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'" *Brown*, *supra*, at 165 (quoting *United States* v. *Jorn*, 400 U. S. 470, 479 (1971) (plurality opinion)).

The Double Jeopardy Clause prevents the government from "mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U. S. 184, 187 (1957). The Clause addresses a further concern as well, that the government not be given the opportunity to rehearse its prosecution, "honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982), because this "enhanc[es] the possibility that even though innocent [the defendant] may be found guilty," *Green*, *supra*, at 188.

Consequently, while the government may punish a person separately for each conviction of at least as many different offenses as meet the *Blockburger* test, we have long held that it must sometimes bring its prosecutions for these offenses together. If a separate prosecution were permitted for every offense arising out of the same conduct, the government could manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct. While punishing different combinations of elements is consistent with the Double Jeopardy Clause in its limitation on the imposition of multiple punishments (a limitation rooted in concerns with legislative intent), permitting such repeated prosecutions would not be consistent with the principles underlying the Clause in its limitation on suc-

cessive prosecutions. The limitation on successive prosecutions is thus a restriction on the government different in kind from that contained in the limitation on multiple punishments, and the government cannot get around the restriction on repeated prosecution of a single individual merely by precision in the way it defines its statutory offenses. Thus, "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown*, 432 U. S., at 166–167, n. 6.

An example will show why this should be so. Assume three crimes: robbery with a firearm, robbery in a dwelling, and simple robbery. The elements of the three crimes are the same, except that robbery with a firearm has the element that a firearm be used in the commission of the robbery while the other two crimes do not, and robbery in a dwelling has the element that the robbery occur in a dwelling while the other two crimes do not.

If a person committed a robbery in a dwelling with a firearm and was prosecuted for simple robbery, all agree he could not be prosecuted subsequently for either of the greater offenses of robbery with a firearm or robbery in a dwelling. Under the lens of *Blockburger*, however, if that same person were prosecuted first for robbery with a firearm, he could be prosecuted subsequently for robbery in a dwelling, even though he could not subsequently be prosecuted on the basis of that same robbery for simple robbery.[3] This is true simply because neither of the crimes, robbery

[3] Our cases have long made clear that the order in which one is prosecuted for two crimes alleged to be the same matters not in demonstrating a violation of double jeopardy. See *Brown* v. *Ohio*, 432 U. S. 161, 168 (1977) ("[T]he sequence is immaterial").

with a firearm and robbery in a dwelling, is either identical to or a lesser included offense of the other. But since the purpose of the Double Jeopardy Clause's protection against successive prosecutions is to prevent repeated trials in which a defendant will be forced to defend against the same charge again and again, and in which the government may perfect its presentation with dress rehearsal after dress rehearsal, it should be irrelevant that the second prosecution would require the defendant to defend himself not only from the charge that he committed the robbery, but also from the charge of some additional fact, in this case, that the scene of the crime was a dwelling.[4] If, instead, protection against successive prosecutions were as limited as it would be by *Blockburger* alone, the doctrine would be as striking for its anomalies as for the limited protection it would provide. Thus, in the relatively few successive prosecution cases we have had over the years, we have not held that the *Blockburger* test is the only hurdle the government must clear (with one exception, see *infra*, at 758–759).

IV

The recognition that a *Blockburger* rule is insufficient protection against successive prosecution can be seen as long ago as *In re Nielsen*, 131 U. S. 176 (1889), where we held that conviction for one statutory offense precluded later prosecution for another, even though each required proof of a fact the other did not. There, appellant Nielsen had been convicted after indictment and a guilty plea in what was then the Territory of Utah for "cohabit[ing] with more than one woman," based upon his cohabitation with Anna Lavinia

[4] The irrelevance of additional elements can be seen in the fact that, as every Member of the Court agrees, the Double Jeopardy Clause does provide protection not merely against prosecution a second time for literally the same offense, but also against prosecution for greater offenses in which the first crime was lesser included, offenses that by definition require proof of one or more additional elements.

Nielsen and Caroline Nielsen during the period from October 15, 1885, to May 13, 1888, in violation of a federal antipolygamy law. See Act of Mar. 22, 1882, ch. 47, §3, 22 Stat. 31. Nielsen served his sentence of three months' imprisonment and paid a $100 fine. He then came to trial on a second indictment charging him under another federal antipolygamy law with committing adultery with Caroline Nielsen on the day following the period described in the first indictment, May 14, 1888, based on the fact that he was married and had a lawful wife, and was not married to Caroline Nielsen. See Act of Mar. 3, 1887, ch. 397, §3, 24 Stat. 635. Nielsen pleaded former jeopardy to the second indictment, arguing first that the true period of the cohabitation charged in the first indictment extended well beyond May 13 until the day of the indictments, September 27, 1888, and that "the offence charged in both indictments was one and the same offence and not divisible." 131 U. S., at 178. The Government argued that the two crimes were not the same because the elements of the two offenses differed.

The *Nielsen* Court first considered the question whether the offense of unlawful cohabitation included, in a temporal sense, the single act of adultery subsequently prosecuted. On this question, the Court first noted, following *In re Snow*, 120 U. S. 274 (1887), that although the indictment for cohabitation listed May 13, 1888, as the end of that offense, cohabitation is a "'continuing offence . . . [that] can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted.'" 131 U. S., at 186 (quoting *Snow*, *supra*, at 282). Thus, the *Nielsen* Court interpreted the indictment for cohabitation as covering a single continuing offense that ended on the day the indictment was handed up. See 131 U. S., at 187.

Having concluded that the offense of cohabitation was a "continuous" one, "extending over the whole period, including the time when the adultery was alleged to have been committed," *id.*, at 187, the Court then considered the ques-

tion whether double jeopardy applies where a defendant is first convicted of a continuing offense and then indicted for some single act that the continuing offense includes. The Court answered this question by quoting with approval an observation found in *Morey* v. *Commonwealth*, 108 Mass. 433 (1871), that "[a] conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time." *Id.*, at 435. The Court then conceded that quoting this observation from the *Morey* opinion would not alone suffice to decide the case before it, since the Government was relying on a further statement from *Morey*, this one expressing the *Morey* court's reason for holding that a prior conviction on a charge of "lewdly and lasciviously associating" with an unmarried woman was no bar to a subsequent prosecution for adultery: "[A]lthough proof of the same acts of unlawful intercourse was introduced on both trials[,] . . . the evidence required to support the two indictments was not the same." 131 U. S., at 188. The *Morey* court's reasoning behind this holding was that "[a] single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." 108 Mass., at 434, quoted in *Nielsen*, *supra*, at 188. *Morey*'s rule governing subsequent prosecution, in other words, was what we know today as the *Blockburger* elements test.

The *Nielsen* Court held the *Blockburger* test inapplicable for two reasons. First, it distinguished *Morey* by noting that "[t]he crime of loose and lascivious association . . . did not necessarily imply sexual intercourse," 131 U. S., at 188, while the continuous offense involved in *Nielsen*, cohabitation under the polygamy statute, required proof of "[l]iving together as man and wife," which "[o]f course" implies "sexual intercourse," even though intercourse need not have been pleaded or proven under a cohabitation indictment, *id.*, at

187. (The second offense charged in both *Morey* and the case before the Court in *Nielsen* was adultery, which, of course, did require an act of sexual intercourse.) But even on the assumption that the continuous crime in *Morey* necessarily did imply sexual intercourse, rendering the cases indistinguishable on their facts, the *Nielsen* Court indicated that it would not follow the holding in *Morey*. To the *Nielsen* Court, it was "very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." 131 U. S., at 188.

By this last statement, the Court rejected, in a successive prosecution case, the double jeopardy test set out in *Morey*, which we later adopted in *Blockburger*; instead of agreeing with *Morey* that "'[t]he test is not, whether the defendant has already been tried for the same act,'" the Court concluded that a defendant "cannot be a second time tried" for a single act included as one of the "various incidents" of a continuous crime for which he has already been convicted.[5] 131 U. S., at 188.

The Court then went on to address the contention that adultery, as opposed to sexual intercourse, is not an act included in the continuing offense of cohabitation, because

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[5] Citing dictionary definitions, the majority claims that "incident," as used in this passage, "obviously" means "element." *Ante*, at 705, n. 10. This explanation does not make sense, for a defendant is not "tried for" an "element"; a defendant may be "tried for" a crime, such as adultery, that contains certain elements, or may be "tried for" certain acts. The immediate context of this passage from *Nielsen* indicates that these latter definitions of "incident" are intended. See, *e. g.*, 131 U. S., at 188 ("'tried for the same act'"). The point is nailed down by the Court's discussion of intercourse as an "incident" of cohabitation, *id.*, at 189, after having indicated that intercourse need not be pleaded or proven under a cohabitation indictment, *id.*, at 187; if "incident" did mean "element," pleading and proof of intercourse would, of course, have been required. "Incident" here clearly means "act."

adultery requires proof that one of the parties is married, while cohabitation does not require such proof. Although the Court agreed that adultery contains such an element, the Court found that this element was irrelevant under its successive prosecution rule, because sexual intercourse is the "essential and principal ingredient of adultery." *Id.*, at 189. In other words, what may not be successively prosecuted is the act constituting the "principal ingredient" of the second offense, if that act has already been the subject of the prior prosecution. It is beside the point that the subsequent offense is defined to include, in addition to that act, some further element uncommon to the first offense (where the first offense also includes an element not shared by the second). Thus, as the Court states its holding, the cohabitation conviction "was a good bar" because "the *material* part of the adultery charged [*i. e.*, intercourse] was comprised within the unlawful cohabitation of which the petitioner was already convicted." *Id.*, at 187 (emphasis supplied); see also *ibid.* (sexual intercourse "was the *integral* part of the adultery charged in the second indictment") (emphasis supplied).

One final aspect of the *Nielsen* opinion deserves attention. After rejecting a *Blockburger* test for successive prosecutions, the Court then proceeded to discuss the familiar rule that conviction of a greater offense bars subsequent prosecution for a lesser included offense. This discussion misleads the majority into thinking that *Nielsen* does nothing more than apply that familiar rule, which is, of course, a corollary to the *Blockburger* test. See *ante*, at 705. But *Nielsen*'s discussion did not proceed on the ground that the Court believed adultery to be a lesser included offense of cohabitation (and thus its later prosecution barred for that reason); on the contrary, the Court had just finished explaining that marriage must be proven for adultery, but not for cohabitation, which precluded finding adultery to be a lesser included offense of cohabitation. The discussion of the lesser included offense rule is apposite for the different reason that once the

element of marriage was disregarded (as the Court had just done, considering instead only adultery's "principal ingredient" of intercourse), the act of intercourse stood to cohabitation as a lesser included offense stands to the greater offense. By treating intercourse as though it were a lesser included offense, *Nielsen* barred subsequent prosecution for that act under an adultery charge. Indeed, on any other reading we would have to conclude that the *Nielsen* Court did not know what it was doing, for if it had been holding only that a subsequent prosecution for a lesser included offense was barred, the adultery prosecution would not have been. There can be no question that the Court was adopting the very different rule that subsequent prosecution is barred for any charge comprising an act that has been the subject of prior conviction.[6]

V

Our modern cases reflect the concerns that resulted in *Nielsen*'s holding. We have already quoted the observation that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown* v. *Ohio*, 432 U. S., at 166–167, n. 6. The *Brown* Court, indeed, relied on *Nielsen* for this proposition. "[I]n *In re Nielsen*, 131 U. S. 176 (1889), the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a 2½-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period .... [S]trict application of the *Blockburger* test would have per-

[6] Our cases, of course, hold that the same protection inheres after an acquittal. See *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969).

mitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. . . . [C]onviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court . . . held the separate offenses to be the 'same.'" *Ibid.*

In the past 20 years the Court has addressed just this problem of successive prosecution on three occasions. In *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*, we held that prosecution for a robbery with firearms was barred by the Double Jeopardy Clause when the defendant had already been convicted of felony murder comprising the same robbery with firearms as the underlying felony. Of course the elements of the two offenses were different enough to permit more than one punishment under the *Blockburger* test: felony murder required the killing of a person by one engaged in the commission of a felony, see 21 Okla. Stat., Tit. 21, § 701 (1971); robbery with firearms required the use of a firearm in the commission of a robbery, see §§ 801, 791. *Harris* v. *State*, 555 P. 2d 76, 80 (Okla. Crim. App. 1976), rev'd, 433 U. S. 682 (1977).

In *Harris*, however, we held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." We justified that conclusion in the circumstances of the case by quoting *Nielsen*'s explanation of the *Blockburger* test's insufficiency for determining when a successive prosecution was barred. "'[A] person [who] has been tried and convicted for a crime which has various incidents included in it . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.' *In re Nielsen*,

[131 U. S.,] at 188." 433 U. S., at 682–683 (citations and footnote omitted).[7]

Just as in *Nielsen*, the analysis in *Harris* turned on considering the prior conviction in terms of the conduct actually charged. While that process might be viewed as a misapplication of a *Blockburger* lesser included offense analysis, the crucial point is that the *Blockburger* elements test would have produced a different result. The case thus follows the holding in *Nielsen* and conforms to the statement already quoted from *Brown*, that the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case.

Subsequently, in *Illinois* v. *Vitale*, 447 U. S. 410 (1980), the Court again indicated that a valid claim of double jeopardy would not necessarily be defeated by the fact that the two offenses are not the "same" under the *Blockburger* test. In that case, we were confronted with a prosecution for failure to reduce speed and a subsequent prosecution for involuntary manslaughter. The opinion of the Illinois Supreme Court below had not made it clear whether the elements of failure to slow were always necessarily included within the elements of involuntary manslaughter by automobile, and we remanded for clarification of this point, among other things. We held that "[i]f, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy . . . ." 447 U. S., at 419–420. But that was not all. Writing for the Court, JUSTICE WHITE went on to say that, "[i]n any event, it may be that to sustain its manslaughter case the State may find it neces-

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[7] In *Brown* we recognized that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." 432 U. S., at 169, n. 7.

sary to prove a failure to slow or to rely on conduct necessarily involving such failure . . . . In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977)." *Id.*, at 420.

Over a decade ago, then, we clearly understood *Harris* to stand for the proposition that when one has already been tried for a crime comprising certain conduct, a subsequent prosecution seeking to prove the same conduct is barred by the Double Jeopardy Clause.[8] This is in no way inconsistent with *Vitale*'s description of *Harris* as "treat[ing] a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." 447 U. S., at 420. The very act of "treating" it that way was a departure from straight *Blockburger* analysis; it was the same departure taken by the *Nielsen* Court. *Vitale* read *Harris* (which itself quoted *Nielsen*) to hold that even if the *Blockburger* test were satisfied, a second prosecution would not be permitted for conduct comprising the criminal act charged in the first. *Nielsen* and *Harris* used the word "incident," while *Vitale* used the word "conduct," but no matter which word is used to describe the unlawful activity for which one cannot again be forced to stand trial, the import of this successive-prosecution strand of our double jeopardy jurisprudence is clear.

Even if this had not been clear since the time of *In re Nielsen*, any debate should have been settled by our decision three Terms ago in *Grady* v. *Corbin*, 495 U. S. 508 (1990),

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[8] It is true that in light of its decision to remand the case to provide the State further opportunity to put forward some other basis for its prosecution, the *Vitale* Court, appropriately, described the claim only as "substantial." The important point, however, is the way in which the Court in *Vitale* (and, for that matter, the dissent in that case, see 447 U. S., at 426 (opinion of STEVENS, J.)) read the *Harris* opinion.

that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*, at 510 (footnote omitted). *Grady* did nothing more than apply a version of the *Nielsen* rule.

As against this sequence of consistent reasoning from *Nielsen* to *Grady*, the Court's citation to two cases, *Gavieres* v. *United States*, 220 U. S. 338, 343 (1911), and *Burton* v. *United States*, 202 U. S. 344, 379–381 (1906), cannot validate its insistence that, prior to *Grady*, our exclusive standard for barring successive prosecutions under the Double Jeopardy Clause was the *Blockburger* test. See *ante*, at 707–708. *Burton* came before the Court on a demurrer. The Court there was not presented with the factual basis for the charges, and simply held that two offenses, accepting a bribe from a company and accepting the same bribe from an officer of that company, were "not identical, in law." 202 U. S., at 381; see also *id.*, at 379 ("[T]he question presented is whether, upon the face of the record, *as matter of law* simply, the offense charged in the third and seventh counts of the present indictment is the same as that charged in the third count of the former indictment") (emphasis in original); *Abbate* v. *United States*, 359 U. S. 187, 198, n. 2 (1959) (opinion of Brennan, J.). Rather than proving that the *Blockburger* same-elements test was always the Court's exclusive guide to evaluation of successive prosecutions prior to *Grady*, *Burton* stands only for the proposition that a claim of double jeopardy resting exclusively on pleadings cannot be adjudicated on any basis except the elements pleaded.

Gavieres is in fact the only case that may even be read to suggest that the Court ever treated a *Blockburger* analysis as the exclusive successive prosecution test under the Double Jeopardy Clause, and its precedential force is weak. *Gavieres* was an interpretation not of the Constitution, but

of an Act of Congress applicable to the Philippines, providing that "no person for the same offense shall be twice put in jeopardy of punishment." Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692. It is true that in his opinion for the Court in *Gavieres*, Justice Day wrote that we had held in *Kepner* v. *United States*, 195 U. S. 100 (1904), "that the protection against double jeopardy therein provided had, by means of this statute, been carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States." 220 U. S., at 341. Nonetheless, this Court has declined to treat decisions under that statute as authoritative constructions of the Fifth Amendment. See *Green* v. *United States*, 355 U. S., at 197, and n. 16; see also *Abbate*, *supra*, at 198, n. 2 (opinion of Brennan, J.).

VI

Burton and *Gavieres* thus lend no support for the Court's decision to overrule *Grady* and constrict *Harris*. Whatever may have been the merits of the debate in *Grady*, the decision deserves more respect than it receives from the Court today. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification. See, *e. g.*, *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944)." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

The search for any justification fails to reveal that *Grady*'s conclusion was either "unsound in principle," or "unworkable in practice." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985). *Grady*'s rule is straightforward, and a departure from it is not justified by the fact that two Court of Appeals decisions have described it as difficult to apply, see *ante*, at 711–712, n. 16, one apparently because it must be distinguished from the "same evidence" test, see *Ladner* v. *Smith*, 941 F. 2d 356, 363–364 (CA5 1991). Nor does the fact that one of those courts has

broken the single sentence of *Grady*'s holding into its four constituent clauses before applying it, see *Ladner, supra,* reveal a type of "'confusion,'" *ante,* at 711 (citation omitted), that can somehow obviate our obligation to adhere to precedent. Cf. *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 173–174 (1989).

Nor do *Burton* and *Gavieres* have the strength to justify the Court's reading of *Harris* solely for the narrow proposition that, in a case where a statute refers to other offenses, the elements of those offenses are incorporated by reference in the statute.[9] While reading the case this way might suffice for purposes of avoiding multiple punishment, this reading would work an unprecedented truncation of the protection afforded by the Double Jeopardy Clause against successive prosecutions, by transferring the government's leeway in determining how many offenses to create to the assessment of how many times a person may be prosecuted for the same conduct. The Double Jeopardy Clause then would provide no more protection against successive prosecutions than it provides against multiple punishments, and instead of expressing some principle underlying the protection against double jeopardy, *Harris* would be an anomaly, an "exceptio[n]" to *Blockburger* without principled justification. *Grady,* 495 U. S., at 528 (SCALIA, J., dissenting). By relying on that anomaly and by defining its offenses with care, the government could not merely add punishment to

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[9] Indeed, at least where the common elements of the offenses themselves describe a separate criminal offense, the Court's reading of *Harris* v. *Oklahoma,* 433 U. S. 682 (1977), is apparently inconsistent even with the historical understanding of the Clause put forward by three of the dissenters in *Grady.* See *Grady* v. *Corbin,* 495 U. S. 508, 531 (1990) (SCALIA, J., dissenting) (quoting 1 T. Starkie, Criminal Pleading, ch. xix, pp. 322–323 (2d ed. 1822)) ("'[I]f one charge consist of the circumstances A. B. C. and another of the circumstances A. D. E. then, *if the circumstance which belongs to them in common does not of itself constitute a distinct substantive offence,* an acquittal from the one charge cannot include an acquittal of the other'") (emphasis supplied).

punishment (within Eighth and Fourteenth Amendment limits), but could bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecution, and increasing the risk of erroneous conviction, all in contravention of the principles behind the protection from successive prosecutions included in the Fifth Amendment. The protection of the Double Jeopardy Clause against successive prosecutions is not so fragile that it can be avoided by finely drafted statutes and carefully planned prosecutions.

VII

I would not invite any such consequences and would here apply our successive prosecution decisions (from *Nielsen* to *Grady*) to conclude that the prosecutions below were barred by the Double Jeopardy Clause. Dixon was prosecuted for violating a court order to "[r]efrain from committing any criminal offense." App. 8. The contempt prosecution proved beyond a reasonable doubt that he had possessed cocaine with intent to distribute it. His prosecution, therefore, for possession with intent to distribute cocaine based on the same incident is barred. It is of course true that the elements of the two offenses can be treated as different. In the contempt conviction, the Government had to prove knowledge of the court order as well as Dixon's commission of some criminal offense. In the subsequent prosecution, the Government would have to prove possession of cocaine with intent to distribute. In any event, because the Government has already prosecuted Dixon for the possession of cocaine at issue here, Dixon cannot be tried for that incident a second time.[10]

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[10] I agree, therefore, with JUSTICE WHITE that the element of knowledge of a court order is irrelevant for double jeopardy purposes. See *ante*, at 734 (opinion concurring in judgment in part and dissenting in part).

Foster was subject to a Civil Protection Order (CPO) not to "molest, assault, or in any manner threaten or physically abuse" his wife, Ana Foster. App. 18. With respect to the period in which the CPO was in effect, Foster was alleged to have violated it (in incidents relevant here) by (1) "grabbing [Ms. Foster] and thr[owing] her against a parked car," on November 6, 1987, by threatening her on (2) November 12, 1987, (3) March 26, 1988, and (4) May 17, 1988, and by (5) throwing her down basement stairs, kicking her and hitting her head against the floor until she lost consciousness, on May 21, 1988. These incidents formed the basis for charging Foster with contempt of court for violation of the CPO. Foster was found guilty of violating the court order by assaulting Ana Foster on November 6, 1987, and May 21, 1988. He was found not guilty of the threats on November 12, 1987, March 26, 1988, and May 17, 1988.

The Government then sought to prosecute Foster for these same threats and assaults, charging him in a five-count indictment with violations of the D. C. Code. Count I charged him with simple assault on November 6, 1987. Since he has already been convicted of this assault, the second prosecution is barred. The Court agrees with this under its reading of *Harris*, but would distinguish the other counts: Counts II, III, and IV (based on the same threats alleged in the contempt proceeding) charging Foster with "threaten[ing] to injure the person of Ana Foster . . . , in violation of 22 D. C. Code, Section 2307" (which prohibits threats to kidnap, to do bodily injury, or to damage property); and Count V, charging Foster with "assaul[t] . . . with intent to kill" as a result of his actions on May 21, 1988. App. 43–44. The Court concludes that the later prosecutions are not barred, because in its view the offenses charged in the indictment each contained an element not contained in the contempt charge (with respect to the threats, that they be threats to kidnap, to inflict bodily injury, or to damage property; with respect to the assault, that it be undertaken with an intent to kill); and

because the contempt charge contained an element not specified by the criminal code sections that formed the basis for the indictment (violation of the CPO). See *ante*, at 700–703.[11]

In each instance, however, the second prosecution is barred under *Nielsen*, *Harris* as we construed it in *Vitale*, and *Grady*. The conduct at issue constituted the conduct in the contempts first charged as well as in the crimes subsequently prosecuted, and the Government's prosecution of Foster twice for the conduct common to both would violate the Double Jeopardy Clause.

VIII

Grady simply applied a rule with roots in our cases going back well over 100 years. *Nielsen* held that the Double Jeopardy Clause bars successive prosecutions for more than one statutory offense where the charges comprise the same act, and *Harris*, as understood in *Vitale*, is properly read as standing for the same rule. Overruling *Grady* alone cannot remove this principle from our constitutional jurisprudence. Only by uprooting the entire sequence of cases, *Grady*, *Vitale*, *Harris*, and *Nielsen*, could this constitutional principle be undone. Because I would not do that, I would affirm the judgment of the Court of Appeals. I concur in the judgment of the Court in *Dixon* and with respect to Count I in *Foster*, but respectfully dissent from the disposition of the case with respect to Counts II–V in *Foster*.

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[11] I note that at least the charge concerning assault with intent to kill would apparently have been barred under the approach taken in JUSTICE SCALIA's dissenting opinion in *Grady*. See n. 9, *supra*.

Syllabus

HARTFORD FIRE INSURANCE CO. ET AL. *v.* CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1111. Argued February 23, 1993—Decided June 28, 1993*

Nineteen States and many private plaintiffs filed complaints alleging that the defendants—four domestic primary insurers, domestic companies who sell reinsurance to insurers, two domestic trade associations, a domestic reinsurance broker, and reinsurers based in London—violated the Sherman Act by engaging in various conspiracies aimed at forcing certain other primary insurers to change the terms of their standard domestic commercial general liability insurance policies to conform with the policies the defendant insurers wanted to sell. After the actions were consolidated for litigation, the District Court granted the defendants' motions to dismiss. The Court of Appeals reversed, rejecting the District Court's conclusion that the defendants were entitled to antitrust immunity under § 2(b) of the McCarran-Ferguson Act, which exempts from federal regulation "the business of insurance," except "to the extent that such business is not regulated by State Law." Although it held the conduct involved to be "the business of insurance," the Court of Appeals ruled that the foreign reinsurers did not fall within § 2(b)'s protection because their activities could not be "regulated by State Law," and that the domestic insurers had forfeited their § 2(b) exemption when they conspired with the nonexempt foreign reinsurers. Furthermore, held the court, most of the conduct in question fell within § 3(b), which provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any . . . act of boycott . . . ." Finally, the court rejected the District Court's conclusion that the principle of international comity barred it from exercising Sherman Act jurisdiction over the three claims brought solely against the London reinsurers.

Held: The judgment is affirmed in part and reversed in part, and the cases are remanded.

938 F. 2d 919, affirmed in part, reversed in part, and remanded.

JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II–A, III, and IV, concluding that:

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*Together with No. 91–1128, *Merrett Underwriting Agency Management Ltd. et al.* v. *California et al.*, also on certiorari to the same court.

Syllabus

1. The domestic defendants did not lose their § 2(b) immunity by conspiring with the foreign defendants. The Court of Appeals's conclusion to the contrary was based in part on the statement, in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 231, that, "[i]n analogous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." Even assuming that foreign reinsurers were "not regulated by State Law," the Court of Appeals's reasoning fails because the analogy drawn by the *Royal Drug* Court was a loose one. Following that language, the *Royal Drug* Court cited two cases dealing with the Capper-Volstead Act, which immunizes certain "persons" from Sherman Act liability. *Ibid.* Because, in contrast, the McCarran-Ferguson Act immunizes activities rather than entities, an entity-based analysis of § 2(b) immunity is inappropriate. See *id.*, at 232–233. Moreover, the agreements at issue in *Royal Drug Co.* were made with "parties wholly outside the insurance industry," *id.*, at 231, whereas the alleged agreements here are with foreign reinsurers and admittedly concern "the business of insurance." Pp. 781–784.

2. Even assuming that a court may decline to exercise Sherman Act jurisdiction over foreign conduct in an appropriate case, international comity would not counsel against exercising jurisdiction in the circumstances alleged here. The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 555 (BLACKMUN, J., concurring in part and dissenting in part). That question must be answered in the negative, since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by United States law or claim that their compliance with the laws of both countries is otherwise impossible. Pp. 794–799.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, concluding that a "boycott" for purposes of § 3(b) of the Act occurs where, in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated transactions with the target. It is not a "boycott" but rather a concerted agreement to terms (a "cartelization") where parties refuse to engage in a particular transaction until the terms of that transaction are agreeable. Under the foregoing test, the allegations of a "boycott" in this litigation, construed most favorably to the respondents, are sufficient to sustain most of the relevant counts of complaint against a motion to dismiss. Pp. 800–811.

Syllabus

SOUTER, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II–A, the opinion of the Court with respect to Parts III and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined, and an opinion concurring in the judgment with respect to Part II–B, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., delivered the opinion of the Court with respect to Part I, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined, *post*, p. 800.

Stephen M. Shapiro argued the cause for petitioners in No. 91–1111. With him on the briefs were *Kenneth S. Geller, Mark I. Levy, Roy T. Englert, Jr., Timothy S. Bishop, Ronald A. Jacks, Richard E. Sherwood, William A. Montgomery, William M. Hannay, John G. Harkins, Jr., Eleanor Morris Illoway, Bartlett H. McGuire, Douglas I. Brandon, James S. Greenan, Raoul D. Kennedy, Alan H. Silberman, Stuart Altschuler, Peter O. Glaessner, David L. Foster, Gregory L. Harris, Frank Rothman, Timothy E. Carr, Kent E. Keller, Lewis A. Kaplan, Allan Blumstein, Ronald C. Redcay, Michael M. Uhlmann, Robert B. Green, Stephen M. Axinn, Michael L. Weiner, James M. Burns, Eugene F. Bannigan, Christine C. Burgess, Robert M. Mitchell, Philip H. Curtis, Zoe Baird, Jane Kelly, Joseph P. Giasi, Jr., Joseph A. Gervasi, Debra J. Anderson, Michael S. Wilder, Jeffrey L. Morris, Edmond F. Rondepierre*, and *John J. Hayden. Molly S. Boast* argued the cause for petitioners in No. 91–1128. With her on the briefs for petitioners Merrett Underwriting Agency Management Ltd. et al. were *Lawrence W. Pollack, Andreas F. Lowenfeld, Barry L. Bunshoft, Eric J. Sinrod, David W. Slaby, Michael L. McCluggage, James T. Nyeste, Michael R. Blankshain, Jerome N. Lerch, Paul R. Haerle, Martin Frederic Evans, Donald Francis Donovan*, and *Colby A. Smith. Barry R. Ostrager, Eleanor M. Fox, Mary Kay Vyskocil*, and *Kathryn A. Clokey* filed briefs for petitioner Sturge Reinsurance Syndicate Management Ltd.

Counsel

Laurel A. Price, Deputy Attorney General of New Jersey, argued the cause for respondents in both cases. With her on the brief for state respondents in No. 91–1111 and on the brief for state respondents in No. 91–1128 were *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Ellen S. Cooper*, Assistant Attorney General, *James H. Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Jim Forbes*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, *Suzanne M. Dallimore*, Assistant Attorney General, *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, *Thomas Greene*, Supervising Deputy Attorney General, *Kathleen E. Foote*, Deputy Attorney General, *Gale A. Norton*, Attorney General of Colorado, *James R. Lewis*, Assistant Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, *Robert M. Langer* and *William M. Rubenstein*, Assistant Attorneys General, *Richard T. Ieyoub*, Attorney General of Louisiana, *Jenifer Schaye*, Assistant Attorney General, *Scott Harshbarger*, Attorney General of Massachusetts, *Thomas M. Alpert* and *George K. Weber*, Assistant Attorneys General, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Thomas F. Pursell*, Deputy Attorney General, *Lisa Tiegel*, Special Assistant Attorney General, *Marc Racicot*, Attorney General of Montana, *Paul Johnson*, Assistant Attorney General, *Robert J. Del Tufo*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *Jerry Boone*, Solicitor General, *George Sampson*, *Richard L. Schwartz* and *Gary J. Malone*, Assistant Attorneys General, *Lee Fisher*, Attorney General of Ohio, *Doreen C. Johnson* and *Marc B. Bandman*, Assistant Attorneys General, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Thomas L. Welch* and *David R. Weyl*, Deputy Attorneys General, *Kenneth O. Eikenberry*, Attorney General of Washington, *John R. Ellis*, Deputy Attorney General, *Tina*

Counsel

E. Kondo, Assistant Attorney General, *Mario J. Palumbo*, Attorney General of West Virginia, *Donald L. Darling*, Deputy Attorney General, *Donna S. Quesenberry*, Senior Assistant Attorney General, *James E. Doyle*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General. *H. Laddie Montague, Jr.*, *Howard Langer*, *Nicholas E. Chimicles*, *Eugene Gressman*, *Jerry S. Cohen*, and *Robert Miller* filed a brief for private respondents in both cases.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Clark*, *Robert A. Long, Jr.*, *Robert B. Nicholson*, *Marion L. Jetton*, *Charles S. Stark*, and *Edward T. Hand*.†

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†Briefs of *amici curiae* urging reversal were filed for the Government of Canada by *Douglas E. Rosenthal;* for the Government of the United Kingdom of Great Britain and Northern Ireland by *Mark R. Joelson;* for the American Insurance Association et al. by *John E. Nolan, Jr.*, *Craig A. Berrington*, and *Patrick J. McNally;* for the National Association of Casualty & Surety Agents et al. by *Anthony C. Epstein* and *Ann M. Kappler;* for the National Conference of Insurance Legislators by *Stephen W. Schwab*, *Seymour Simon*, and *Reuben A. Bernick;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Thomas P. Perkins, Jr.*, *Mark Tobey*, *Katherine D. Farroba*, and *Floyd Russell Ham*, Assistant Attorneys General, *Charles M. Oberly III*, Attorney General of Delaware, *John J. Polk*, Deputy Attorney General, *Robert A. Butterworth*, Attorney General of Florida, *Scott E. Clodfelter*, Assistant Attorney General, *Robert A. Marks*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Brett T. DeLange*, Deputy Attorney General, *Bonnie J. Campbell*, Attorney General of Iowa, *John R. Perkins*, Deputy Attorney General, *Chris Gorman*, Attorney General of Kentucky, *Robert V. Bullock*, Assistant Attorney General, *Mike Moore*, Attorney General of Mississippi, *Jim Steele*, Special Assistant Attorney General, *William L. Webster*, Attorney General of Missouri, *Henry T. Herschel*, *Tom Udall*, Attorney General of New Mexico, *Frankie Sue Del Papa*, Attorney General of Nevada, *Lacy H. Thornburg*, Attorney

JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV, and an opinion concurring in the judgment with respect to Part II–B.*

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, 15 U. S. C. § 1. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not im-

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General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, *David W. Huey*, Assistant Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, *Maureen G. Glynn*, Special Assistant Attorney General, *T. Travis Medlock*, Attorney General of South Carolina, *Mark Barnett*, Attorney General of South Dakota, *Jeffrey P. Hallem*, Assistant Attorney General, *R. Paul Van Dam*, Attorney General of Utah, *Patrice Arent* and *Cy H. Castle*, Assistant Attorneys General, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Julie Brill*, Assistant Attorney General, and *Mary Sue Terry*, Attorney General of Virginia; for the National League of Cities et al. by *Lawrence Kill* and *Anthony P. Coles;* and for the Service Station Dealers of America by *Dimitri G. Daskalopoulos.*

Richard I. Fine filed a brief for the Service Industry Council et al. as *amicus curiae.*

*JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join this opinion in its entirety, and THE CHIEF JUSTICE joins Parts I, II–A, III, and IV.

munized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

I

The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance[1] available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true.[2]

A

According to the complaints, the object of the conspiracies was to force certain primary insurers (insurers who sell insurance directly to consumers) to change the terms of their

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[1] CGL insurance provides "coverage for third party casualty damage claims against a purchaser of insurance (the 'insured')." App. 8 (Cal. Complaint ¶ 4.a).

[2] Following the lower courts and the parties, see *In re Insurance Antitrust Litigation*, 938 F. 2d 919, 924, 925 (CA9 1991), we will treat the complaint filed by California as representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin, and the complaint filed by Connecticut as representative of the claims of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. As will become apparent, the California and Connecticut Complaints differ slightly in their presentations of background information and their claims for relief; their statements of facts are identical. Because the private party plaintiffs have chosen in their brief in this Court to use the California Complaint as a "representative model" of their claims, Brief for Respondents (Private Party Plaintiffs) 3, n. 6, we will assume that their complaints track that complaint. On remand, the courts below will of course be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes.[3]

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." App. 22 (Cal. Complaint ¶ 52). In place of this traditional "occurrence" trigger of coverage, the defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered "sudden and accidental" pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants

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[3] The First Claim for Relief in the Connecticut Complaint, App. 88–90 (¶¶ 115–119), charges all the defendants with an overarching conspiracy to force all four of these changes on the insurance market. The eight federal-law Claims for Relief in the California Complaint, *id.*, at 36–49 (¶¶ 111–150), charge various subgroups of the defendants with separate conspiracies that had more limited objects; not all of the defendants are alleged to have desired all four changes.

wanted legal defense costs to be counted against the stated limits (providing a "legal defense cost cap").

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. See *id.*, at 19 (Cal. Complaint ¶ 38). ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. *Ibid.* (Cal. Complaint ¶ 39); *id.*, at 74 (Conn. Complaint ¶ 50). All of the "traditional" features of CGL insurance relevant to this litigation were embodied in the ISO standard CGL insurance form that had been in use since 1973 (1973 ISO CGL form). *Id.*, at 22 (Cal. Complaint ¶¶ 51–54); *id.*, at 75 (Conn. Complaint ¶¶ 56–58). For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, *id.*, at 19 (Cal. Complaint ¶ 39); *id.*, at 74 (Conn. Complaint ¶¶ 51–52), and on the basis of these data it predicts future loss trends and calculates advisory premium rates, *id.*, at 19 (Cal. Complaint ¶ 39); *id.*, at 74 (Conn. Complaint ¶ 53). Most ISO members cannot afford to continue to use a form if ISO withdraws these support services. See *id.*, at 32–33 (Cal. Complaint ¶¶ 97, 99).

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the

consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer from catastrophic loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.*, at 17 (Cal. Complaint ¶ 29). Thus, "[t]he availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers." *Id.*, at 18 (Cal. Complaint ¶ 34); *id.*, at 63 (Conn. Complaint ¶ 4(p)). Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. See *ibid.* (Conn. Complaint ¶ 4(r)). Many of the defendants here are reinsurers or reinsurance brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

B

The prehistory of events claimed to give rise to liability starts in 1977, when ISO began the process of revising its 1973 CGL form. *Id.*, at 22 (Cal. Complaint ¶ 55). For the first time, it proposed two CGL forms (1984 ISO CGL forms), one the traditional "occurrence" type, the other "with a new 'claims-made' trigger." *Id.*, at 22–23 (Cal. Complaint ¶ 56). The "claims-made" form did not have a retroactive date provision, however, and both 1984 forms covered "'sudden and accidental' pollution" damage and provided for unlimited coverage of legal defense costs by the insurer. *Id.*, at 23 (Cal. Complaint ¶¶ 59–60). Within the ISO, defendant Hartford Fire Insurance Company objected to the proposed 1984 forms; it desired elimination of the "occurrence" form, a retroactive date provision on the "claims-made" form, elimination of sudden and accidental pollution coverage, and a legal defense cost cap. Defendant Allstate Insurance Company also expressed its desire for a retroactive date provision on

the "claims-made" form. *Id.*, at 24 (Cal. Complaint ¶ 61). Majorities in the relevant ISO committees, however, supported the proposed 1984 CGL forms and rejected the changes proposed by Hartford and Allstate. In December 1983, the ISO Board of Directors approved the proposed 1984 forms, and ISO filed or lodged the forms with state regulators in March 1984. *Ibid.* (Cal. Complaint ¶ 62).

Dissatisfied with this state of affairs, the defendants began to take other steps to force a change in the terms of coverage of CGL insurance generally available, steps that, the plaintiffs allege, implemented a series of conspiracies in violation of § 1 of the Sherman Act. The plaintiffs recount these steps as a number of separate episodes corresponding to different claims for relief in their complaints;[4] because it will become important to distinguish among these counts and the acts and defendants associated with them, we will note these correspondences.

The first four Claims for Relief in the California Complaint, *id.*, at 36–43 (¶¶ 111–130), and the Second Claim for Relief in the Connecticut Complaint, *id.*, at 90–92 (¶¶ 120–124), charge the four domestic primary insurer defendants and varying groups of domestic and foreign reinsurers, brokers, and associations with conspiracies to manipulate the ISO CGL forms. In March 1984, primary insurer Hartford persuaded General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps either to procure desired changes in the ISO CGL forms, or "failing that, [to] 'derail' the entire ISO CGL forms program." *Id.*, at 24 (Cal. Complaint ¶ 64). General Re took up the matter with its trade association, RAA, which created a special committee that met and agreed to "boycott" the 1984 ISO CGL forms unless a retroactive-date provision was added to the

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[4] The First Claim for Relief in the Connecticut Complaint, *id.*, at 88–90 (¶¶ 115–119), charging an overarching conspiracy encompassing all of the defendants and all of the conduct alleged, is a special case. See n. 18, *infra*.

claims-made form, and a pollution exclusion and defense cost cap were added to both forms. *Id.*, at 24–25 (Cal. Complaint ¶¶ 65–66). RAA then sent a letter to ISO "announc[ing] that its members would not provide reinsurance for coverages written on the 1984 CGL forms," *id.*, at 25 (Cal. Complaint ¶ 67), and Hartford and General Re enlisted a domestic reinsurance broker to give a speech to the ISO Board of Directors, in which he stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms. *Ibid.* (Cal. Complaint ¶ 68).

The four primary insurer defendants (Hartford, Aetna, CIGNA, and Allstate) also encouraged key actors in the London reinsurance market, an important provider of reinsurance for North American risks, to withhold reinsurance for coverages written on the 1984 ISO CGL forms. *Id.*, at 25–26 (Cal. Complaint ¶¶ 69–70). As a consequence, many London-based underwriters, syndicates, brokers, and reinsurance companies informed ISO of their intention to withhold reinsurance on the 1984 forms, *id.*, at 26–27 (Cal. Complaint ¶¶ 71–75), and at least some of them told ISO that they would withhold reinsurance until ISO incorporated all four desired changes, see *supra*, at 771, and n. 3, into the ISO CGL forms. App. 26 (Cal. Complaint ¶ 74).

For the first time ever, ISO invited representatives of the domestic and foreign reinsurance markets to speak at an ISO Executive Committee meeting. *Id.*, at 27–28 (Cal. Complaint ¶ 78). At that meeting, the reinsurers "presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." *Id.*, at 29 (Cal. Complaint ¶ 82). The ISO Executive Committee then voted to include a retroactive-date provision in the claims-made form, and to exclude all pollution coverage from both new forms. (But it neither eliminated the occurrence form, nor added a legal defense cost cap.) The 1984 ISO CGL forms were then withdrawn from the marketplace, and replaced with forms (1986 ISO CGL forms) containing the new provisions. *Ibid.*

(Cal. Complaint ¶ 84). After ISO got regulatory approval of the 1986 forms in most States where approval was needed, it eliminated its support services for the 1973 CGL form, thus rendering it impossible for most ISO members to continue to use the form. *Id.*, at 32–33 (Cal. Complaint ¶¶ 97, 99).

The Fifth Claim for Relief in the California Complaint, *id.*, at 43–44 (¶¶ 131–135), and the virtually identical Third Claim for Relief in the Connecticut Complaint, *id.*, at 92–94 (¶¶ 125–129), charge a conspiracy among a group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. The reinsurers collectively refused to write new reinsurance contracts for, or to renew longstanding contracts with, "primary . . . insurers unless they were prepared to switch from the occurrence to the claims-made form," *id.*, at 30 (Cal. Complaint ¶ 88); they also amended their reinsurance contracts to cover only claims made before a "'sunset date,'" thus eliminating reinsurance for claims made on occurrence policies after that date, *id.*, at 31 (Cal. Complaint ¶¶ 90–92).

The Sixth Claim for Relief in the California Complaint, *id.*, at 45–46 (¶¶ 136–140), and the nearly identical Fourth Claim for Relief in the Connecticut Complaint, *id.*, at 94–95 (¶¶ 130–134), charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. The London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks, including CGL risks, would be written with a complete exclusion for pollution liability coverage. *Id.*, at 32 (Cal. Complaint ¶¶ 94–95). In accordance with this agreement, the parties have in fact excluded pollution liability coverage from CGL reinsurance contracts since at least late 1985. *Ibid.* (Cal. Complaint ¶ 94).

The Seventh Claim for Relief in the California Complaint, *id.*, at 46–47 (¶¶ 141–145), and the closely similar Sixth Claim for Relief in the Connecticut Complaint, *id.*, at 97–98 (¶¶ 140–144), charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for "excess" and "umbrella" insurance by drafting model forms and policy language for these types of insurance, which are not normally offered on a regulated basis. *Id.*, at 33 (Cal. Complaint ¶ 101). The ISO Executive Committee eventually released standard language for both "occurrence" and "claims-made" umbrella and excess policies; that language included a retroactive date in the claims-made version, and an absolute pollution exclusion and a legal defense cost cap in both versions. *Id.*, at 34 (Cal. Complaint ¶ 105).

Finally, the Eighth Claim for Relief in the California Complaint, *id.*, at 47–49 (¶¶ 146–150), and its counterpart in the Fifth Claim for Relief in the Connecticut Complaint, *id.*, at 95–97 (¶¶ 135–139), charge a group of London and domestic retrocessional reinsurers[5] with conspiring to withhold retrocessional reinsurance for North American seepage, pollution, and property contamination risks. Those retrocessional reinsurers signed, and have implemented, an agreement to use their "'best endeavors'" to ensure that they would provide such reinsurance for North American risks "'only . . . where the original business includes a seepage and pollution exclu-

[5] The California and Connecticut Complaints' Statements of Facts describe this conspiracy as involving "[s]pecialized reinsurers in London and the United States." App. 34 (¶ 106); *id.*, at 87 (Conn. Complaint ¶ 110). The claims for relief, however, name only London reinsurers; they do not name any of the domestic defendants who are the petitioners in No. 91–1111. See *id.*, at 48 (¶ 147); *id.*, at 96 (Conn. Complaint ¶ 136). Thus, we assume that the domestic reinsurers alleged to be involved in this conspiracy are among the "unnamed co-conspirators" mentioned in the complaints. See *id.*, at 48 (Cal. Complaint ¶ 147); *id.*, at 96 (Conn. Complaint ¶ 136).

sion wherever legal and applicable.'" *Id.*, at 35 (Cal. Complaint ¶ 108).[6]

C

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated § 1 of the Sherman Act, 15 U. S. C. § 1. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (1989). It held that the conduct alleged fell within the grant of antitrust immunity contained in § 2(b) of the McCarran-Ferguson Act, 15 U. S. C. § 1012(b), because it amounted to "the business of insurance" and was "regulated by State Law" within the meaning of that section; none of the conduct, in the District Court's view, amounted to a "boycott" within the meaning of the § 3(b) exception to that grant of immunity. 15 U. S. C. § 1013(b). The District Court also dismissed the three claims that named only certain London-based defendants,[7] invoking international comity and applying the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597 (1976).

The Court of Appeals reversed. *In re Insurance Antitrust Litigation*, 938 F. 2d 919 (CA9 1991). Although it held the conduct involved to be "the business of insurance" within the meaning of § 2(b), it concluded that the defendants could

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[6] The Ninth, Tenth, and Eleventh Claims for Relief in the California Complaint, *id.*, at 49–50 (¶¶ 151–156), and the Seventh Claim for Relief in the Connecticut Complaint, *id.*, at 98 (¶¶ 145–146), allege state-law violations not at issue here.

[7] These are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint, and the corresponding Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint.

not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be "regulated by State Law" within the meaning of § 2(b), they did not fall within that section's grant of immunity. Although the domestic insurers were "regulated by State Law," the court held, they forfeited their § 2(b) exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of § 2(b), it also fell within the § 3(b) exception for "act[s] of boycott, coercion, or intimidation." Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

We granted certiorari in No. 91–1111 to address two narrow questions about the scope of McCarran-Ferguson Act antitrust immunity,[8] and in No. 91–1128 to address the application of the Sherman Act to the foreign conduct at issue.[9] 506 U. S. 814 (1992). We now affirm in part, reverse in part, and remand.

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[8] We limited our grant of certiorari in No. 91–1111 to these questions: "1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance," and "2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a 'boycott' outside the exemption of the McCarran-Ferguson Act." Pet. for Cert. in No. 91–1111, p. i; see 506 U. S. 814 (1992).

[9] The question presented in No. 91–1128 is: "Did the court of appeals properly assess the extraterritorial reach of the U. S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U. S. district court may apply U. S. law to the conduct of a foreign insurance market regulated abroad?" Pet. for Cert. in No. 91–1128, p. i.

II

The petition in No. 91–1111 touches on the interaction of two important pieces of economic legislation. The Sherman Act declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . . to be illegal." 15 U. S. C. § 1. The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, 15 U. S. C. § 1012(a), and (again, generally) that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," § 1012(b). Section 2(b) of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies "to the business of insurance to the extent that such business is not regulated by State Law," § 1012(b), and § 3(b) provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," § 1013(b).

Petitioners in No. 91–1111 are all of the domestic defendants in the consolidated cases: the four domestic primary insurers, the domestic reinsurers, the trade associations ISO and RAA, and the domestic reinsurance broker Thomas A. Greene & Company, Inc. They argue that the Court of Appeals erred in holding, first, that their conduct, otherwise immune from antitrust liability under § 2(b) of the McCarran-Ferguson Act, lost its immunity when they conspired with the foreign defendants, and, second, that their conduct amounted to "act[s] of boycott" falling within the exception to antitrust immunity set out in § 3(b). We conclude that the Court of Appeals did err about the effect of conspiring with foreign defendants, but correctly decided that all but one of the complaints' relevant Claims for Relief are fairly read to allege conduct falling within the "boycott" exception to McCarran-Ferguson Act antitrust immunity. We there-

fore affirm the Court of Appeals's judgment that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act immunity, except as to the one claim for relief that the Court of Appeals correctly found to allege no boycott.

A

By its terms, the antitrust exemption of § 2(b) of the McCarran-Ferguson Act applies to "the business of insurance" to the extent that such business is regulated by state law. While "business" may mean "[a] commercial or industrial establishment or enterprise," Webster's New International Dictionary 362 (2d ed. 1942), the definite article before "business" in § 2(b) shows that the word is not used in that sense, the phrase "the business of insurance" obviously not being meant to refer to a single entity. Rather, "business" as used in § 2(b) is most naturally read to refer to "[m]ercantile transactions; buying and selling; [and] traffic." *Ibid.*

The cases confirm that "the business of insurance" should be read to single out one activity from others, not to distinguish one entity from another. In *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), for example, we held that § 2(b) did not exempt an insurance company from antitrust liability for making an agreement fixing the price of prescription drugs to be sold to Blue Shield policyholders. Such activity, we said, "would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do." *Id.*, at 233 (footnote omitted); see *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969) (the McCarran-Ferguson Act's "language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'") (emphasis in original). And in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119 (1982), we explicitly framed the question as whether "a particular *practice* is part of the 'business of insurance' exempted from the anti-

trust laws by § 2(b)," *id.*, at 129 (emphasis added), and each of the three criteria we identified concerned a quality of the practice in question: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry," *ibid.* (emphasis in original).

The Court of Appeals did not hold that, under these criteria, the domestic defendants' conduct fell outside "the business of insurance"; to the contrary, it held that that condition was met.[10] See 938 F. 2d, at 927. Nor did it hold the domestic defendants' conduct to be "[un]regulated by State Law." Rather, it constructed an altogether different chain of reasoning, the middle link of which comes from a sentence in our opinion in *Royal Drug Co.* "[R]egulation . . . of foreign reinsurers," the Court of Appeals explained, "is beyond the jurisdiction of the states," 938 F. 2d, at 928, and hence § 2(b) does not exempt foreign reinsurers from antitrust liability, because their activities are not "regulated by State Law." Under *Royal Drug Co.*, "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U. S., at 231. Therefore, the domestic insurers, by acting in concert with the nonexempt foreign insurers, lost their McCarran-Ferguson Act antitrust immunity. See 938 F. 2d, at 928. This reasoning fails, however, because even if we were to agree that foreign reinsurers were not subject to state regulation (a point on which we express no opinion), the quoted language from *Royal Drug Co.*, read

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[10] The activities in question here, of course, are alleged to violate federal law, and it might be tempting to think that unlawful acts are implicitly excluded from "the business of insurance." Yet § 2(b)'s grant of immunity assumes that acts which, but for that grant, would violate the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, are part of "the business of insurance."

in context, does not state a proposition applicable to this litigation.

The full sentence from *Royal Drug Co.* places the quoted fragment in a different light. "In analogous contexts," we stated, "the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U. S., at 231. We then cited two cases dealing with the Capper-Volstead Act, which immunizes from liability under § 1 of the Sherman Act particular activities of certain persons "engaged in the production of agricultural products."[11] Capper-Volstead Act, § 1, 42 Stat. 388, 7 U. S. C. § 291; see *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384 (1967); *United States* v. *Borden Co.*, 308 U. S. 188 (1939). Because these cases relied on statutory language referring to certain "persons," whereas we specifically acknowledged in *Royal Drug Co.* that the McCarran-Ferguson Act immunizes activities rather than entities, see 440 U. S., at 232–233, the analogy we were drawing was of course a loose one. The agreements that insurance companies made with "parties wholly outside the insurance industry," *id.*, at 231, we noted, such as the retail pharmacists involved in *Royal Drug Co.* itself, or "automobile body repair shops or landlords," *id.*, at 232 (footnote omitted), are un-

[11] We also cited two cases dealing with the immunity of certain agreements of labor unions under the Clayton and Norris-LaGuardia Acts. See 440 U. S., at 231–232. These cases, however, did not hold that labor unions lose their immunity whenever they enter into agreements with employers; to the contrary, we acknowledged in one of the cases that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." *Mine Workers* v. *Pennington*, 381 U. S. 657, 664 (1965). Because the cases stand only for the proposition that labor unions are not immune from antitrust liability for certain types of agreements with employers, such as agreements "to impose a certain wage scale on other bargaining units," *id.*, at 665, they do not support the far more general statement that exempt entities lose immunity by conspiring with nonexempt entities.

likely to be about anything that could be called "the business of insurance," as distinct from the broader "'business of insurance companies,'" *id.*, at 233. The alleged agreements at issue in the instant litigation, of course, are entirely different; the foreign reinsurers are hardly "wholly outside the insurance industry," and respondents do not contest the Court of Appeals's holding that the agreements concern "the business of insurance." These facts neither support even the rough analogy we drew in *Royal Drug Co.* nor fall within the rule about acting in concert with nonexempt parties, which derived from a statute inapplicable here. Thus, we think it was error for the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument, were "not regulated by State Law."[12]

B

That the domestic defendants did not lose their § 2(b) exemption by acting together with foreign reinsurers, however, is not enough reason to reinstate the District Court's dismissal order, for the Court of Appeals reversed that order on two independent grounds. Even if the participation of foreign reinsurers did not affect the § 2(b) exemption, the Court of Appeals held, the agreements and acts alleged by the plaintiffs constitute "agreement[s] to boycott" and "act[s] of boycott [and] coercion" within the meaning of § 3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreements and acts regardless of the § 2(b) exemption. See 938 F. 2d, at 928. I agree with

[12] The Court of Appeals's assumption that "the American reinsurers . . . are subject to regulation by the states and therefore prima facie immune," 938 F. 2d, at 928, appears to rest on the entity-based analysis we have rejected. As with the foreign reinsurers, we express no opinion whether the activities of the domestic reinsurers were "regulated by State Law" and leave that question to the Court of Appeals on remand.

the Court that, construed in favor of the plaintiffs, the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the First and Second Claims for Relief in the Connecticut Complaint, allege one or more §3(b) "act[s] of boycott," and are thus sufficient to survive a motion to dismiss. See *infra*, at 789–790; *post*, at 811.

In reviewing the motions to dismiss, however, the Court has decided to use what I believe to be an overly narrow definition of the term "boycott" as used in §3(b), confining it to those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Post*, at 803. I do not believe that the McCarran-Ferguson Act or our precedents warrant such a cramped reading of the term.

The majority and I find common ground in four propositions concerning §3(b) boycotts, as established in our decisions in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978), and *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). First, as we noted in *St. Paul*, our only prior decision construing "boycott" as it appears in §3(b), only those refusals to deal involving the coordinated action of multiple actors constitute §3(b) boycotts: "conduct by individual actors falling short of concerted activity is simply not a 'boycott' within [the meaning of] §3(b)." 438 U. S., at 555; see *post*, at 800 ("'boycott'" used "to describe . . . collective action"); *post*, at 801 ("To 'boycott' means '[t]o combine in refusing to hold relations'" (citation omitted)).

Second, a §3(b) boycott need not involve an absolute refusal to deal.[13] A primary goal of the alleged conspirators in *South-Eastern Underwriters*, as we described it, was "to force nonmember insurance companies into the conspiracies."[14] 322 U. S., at 535; cf. Joint Hearing on S. 1362, H. R.

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[13] Petitioners correctly concede this point. See Brief for Petitioners in No. 91-1111, p. 32, n. 14.

[14] As we have noted before, see *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 217 (1979); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 458 (1969), the McCarran-Ferguson Act was precipitated by our

3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 335 (1943) (statement of Edward L. Williams, President, Insurance Executives Association) ("[T]he companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down"). Thus, presumably, the refusals to deal orchestrated by the defendants would cease if the targets agreed to join the association and abide by its terms. See *post*, at 801 ("The refusal to deal may . . . be conditional" (emphasis omitted)).

Third, contrary to petitioners' contentions, see Brief for Petitioners in No. 91–1111, pp. 32, n. 14, 34, 38–39, a § 3(b) boycott need not entail unequal treatment of the targets of the boycott and its instigators. Some refusals to deal (those, perhaps, which are alleged to violate only § 2 of the Sherman Act[15]) may have as their object the complete destruction of the business of competitors; these may well involve unconditional discrimination against the targets. Other refusals to deal, however, may seek simply to prevent competition as to the price or features of the product sold; and these need not depend on unequal treatment of the targets. Assuming,

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holding in *South-Eastern Underwriters* that the business of insurance was interstate commerce and thus subject generally to federal regulation under the Commerce Clause, and to scrutiny under the Sherman Act specifically. Congress responded, both to "ensure that the States would continue to have the ability to tax and regulate the business of insurance," *Royal Drug Co.*, 440 U. S., at 217–218 (footnote omitted), and to limit the application of the antitrust laws to the insurance industry, *id.*, at 218. In drafting the § 3(b) exception to the § 2(b) grant of antitrust immunity, Congress borrowed language from our description of the indictment in *South-Eastern Underwriters* as charging that "[t]he conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies." 322 U. S., at 535.

[15] Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2, prohibits monopolization of, or attempts or conspiracies to monopolize, "any part of the trade or commerce among the several States, or with foreign nations."

as the *South-Eastern Underwriters* Court appears to have done, that membership in the defendant association was open to all insurers, the association is most readily seen as having intended to treat all insurers equally: they all had the choice either to join the association and abide by its rules, or to be subjected to the "boycotts," and acts of coercion and intimidation, alleged in that case. See *post*, at 808 (describing *South-Eastern Underwriters* as involving a "boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy").

Fourth, although a necessary element, "concerted activity" is not, by itself, sufficient for a finding of "boycott" under § 3(b). Were this the case, we recognized in *Barry*, § 3(b) might well "'devour the broad antitrust immunity bestowed by § 2(b),'" 438 U. S., at 545, n. 18 (quoting *id.*, at 559 (Stewart, J., dissenting)), since every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 15 U. S. C. § 1, involves "concerted activity." Thus, we suggested, simple price fixing has been treated neither as a boycott nor as coercion "in the absence of any additional enforcement activity." 438 U. S., at 545, n. 18; see *post*, at 804 (contending that simple concerted agreements on contract terms are not properly characterized as boycotts).

Contrary to the majority's view, however, our decisions have suggested that "enforcement activity" is a multifarious concept. The *South-Eastern Underwriters* Court, which coined the phrase "boycotts[,] . . . coercion and intimidation," 322 U. S., at 535; see n. 14, *supra*, provides us with a list of actions that, it finds, are encompassed by these terms. "Companies not members of [the association]," it states, "were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-[association] companies were punished by a withdrawal of the right to represent the members of [the association]; and persons needing insurance who purchased from non-

[association] companies were threatened with boycotts and withdrawal of all patronage." 322 U. S., at 535–536. Faced with such a list, and with all of the other instances in which we have used the term "boycott," we rightly came to the conclusion in *Barry* that, as used in our cases, the term does not refer to a "'unitary phenomenon.'" 438 U. S., at 543 (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974)).

The question in this litigation is whether the alleged activities of the domestic defendants, acting together with the foreign defendants who are not petitioners here, include "enforcement activities" that would raise the claimed attempts to fix terms to the level of §3(b) boycotts. I believe they do. The core of the plaintiffs' allegations against the domestic defendants concern those activities that form the basis of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint: the conspiracies involving both the primary insurers and domestic and foreign brokers and reinsurers to force changes in the ISO CGL forms. According to the complaints, primary insurer defendants Hartford and Allstate first tried to convince other members of the ISO that the ISO CGL forms should be changed to limit coverage in the manner we have detailed above, see *supra*, at 773–774; but they failed to persuade a majority of members of the relevant ISO committees, and the changes were not made. Unable to persuade other primary insurers to agree voluntarily to their terms, Hartford and Allstate, joined by Aetna and CIGNA, sought the aid of other individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it. The four primary insurers convinced these individuals and entities, the reinsurers, to put pressure on ISO and its members by refusing to reinsure coverages written on the ISO CGL forms until the desired changes were made. Both domestic and foreign reinsurers, acting at the behest of the four pri-

mary insurers, announced that they would not reinsure under the ISO CGL forms until changes were made. As an immediate result of this pressure, ISO decided to include a retroactive-date provision in its claims-made form, and to exclude all pollution coverage from both its claims-made and occurrence forms. In sum, the four primary insurers solicited refusals to deal from outside the primary insurance industry as a means of forcing their fellow primary insurers to agree to their terms; the outsiders, acting at the behest of the four, in fact refused to deal with primary insurers until they capitulated, which, in part at least, they did.

This pattern of activity bears a striking resemblance to the first act of boycott listed by the *South-Eastern Underwriters* Court; although neither the *South-Eastern Underwriters* opinion, nor the underlying indictment, see Transcript of Record, O. T. 1943, No. 354, p. 11 (¶ 22(e)), details exactly how the defendants managed to "cut off [nonmembers] from the opportunity to reinsure their risks," 322 U. S., at 535, the defendants could have done so by prompting reinsurance companies to refuse to deal with nonmembers, just as is alleged here.[16] Moreover, the activity falls squarely

[16] The majority claims that this refusal to deal was a boycott only because "membership in the association [had] no discernible bearing upon the terms of the refused reinsurance contracts." *Post*, at 809. Testimony at the hearings on the bill that became the McCarran-Ferguson Act indicates that the insurance companies thought otherwise. "We say 'You do not issue insurance to a company that does not do business the way we think it should be done and belong to our association.' . . . It is for the protection of the public, the stockholders, and the companies. . . . You know when those large risks are taken that they have to be reinsured. We do not want to have to take a risk that is bad, or at an improper rate, or an excessive commission, we do not want our agents to take that, nor do we want to reinsure part of the risk that is written that way. We feel this way—that some groups are doing business in what is not the proper way, we feel it is not in the interest of the companies and it is not in the interest of the public, and we just do not want to do business with them." Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2,

within even the narrow theory of the § 3(b) exception Justice Stewart advanced in dissent in *Barry*. Under that theory,[17] the § 3(b) exception should be limited to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." 438 U. S., at 565. I can think of no better description of the four primary insurers' activities in this litigation. For these reasons, I agree with the Court's ultimate conclusion that the Court of Appeals was correct in reversing the District Court's dismissal of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint.[18]

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p. 333 (1943) (statement of Edward L. Williams, President, Insurance Executives Association).

[17] In passing the McCarran-Ferguson Act, Justice Stewart argued, "Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 565 (1978) (dissenting opinion). Hence, § 2(b) provides that the federal antitrust laws will generally not be applicable to those insurance business practices "regulated by State law," and presumably state law could, for example, either mandate price fixing, or specifically authorize voluntary price-fixing agreements. On the other hand, Congress intended to delegate regulatory power only to the States; nothing in the McCarran-Ferguson Act suggests that Congress wanted one insurer, or a group of insurers, to be able to formulate and enforce policy for other insurers. Thus, the enforcement activities that distinguish § 3(b) "boycotts" from other concerted activity include, in this context, "*private enforcement* . . . of industry rules and practices, even if those rules and practices are permitted by state law." *Id.*, at 565–566 (emphasis in original) (footnote omitted).

[18] The First and Sixth Claims for Relief in the Connecticut Complaint, and the Seventh Claim for Relief in the California Complaint, which also name some or all of the petitioners, present special cases. The First Claim for Relief in the Connecticut Complaint alleges an overarching conspiracy involving all of the defendants named in the complaint and all of the conduct alleged. As such, it encompasses "boycott" activity, and the Court of Appeals was correct to reverse the District Court's order dismissing it. As currently described in the complaint's statement of facts, however, some of the actions of the reinsurers and the retrocessional reinsurers appear to have been taken independently, rather than at the behest

The majority concludes that, so long as the reinsurers' role in this course of action was limited to "a concerted agreement to seek particular terms in particular transactions," *post*, at 801–802, the course of action could never constitute a § 3(b) boycott. The majority's emphasis on this conclusion assumes an artificial segmentation of the course of action, and a false perception of the unimportance of the elements of that course of action other than the reinsurers' agreement. The majority concedes that the complaints allege, not just implementation of a horizontal agreement, but refusals to deal that occurred "at the behest of," or were "solicited by," the four primary insurers, who were "competitors of the tar-

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of the primary insurer defendants. I express no opinion as to whether those acts, if they were indeed taken independently, could amount to § 3(b) boycotts; but I note that they lack the key element on which I rely in this litigation to find a sufficient allegation of boycott.

The Seventh Claim for Relief in the California Complaint, and the virtually identical Sixth Claim for Relief in the Connecticut Complaint, allege a conspiracy among a group of domestic primary insurers, foreign reinsurers, and the ISO to draft restrictive model forms and policy language for "umbrella" and "excess" insurance. On these claims, the Court of Appeals reversed the District Court's order of dismissal as to the domestic defendants solely because those defendants "act[ed] in concert" with nonexempt foreign defendants, 938 F. 2d, at 931, relying on reasoning that the Court has found to be in error, see *supra*, at 781–784. The Court of Appeals found that "[n]o boycotts [were] alleged as the defendants' modus operandi in respect to [excess and umbrella] insurance." 938 F. 2d, at 930. I agree; even under a liberal construction of the complaints in favor of plaintiffs, I can find no allegation of any refusal to deal in connection with the drafting of the excess and umbrella insurance language. Therefore I conclude that neither the participation of unregulated parties nor the application of § 3(b) furnished a basis to reverse the District Court's dismissal of these claims as against the domestic insurers, and I would reverse the judgment of the Court of Appeals in this respect. The Fifth, Sixth, and Eighth Claims for Relief in the California Complaint and the Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint also allege concerted refusals to deal; but because they do not name any of the petitioners in No. 91–1111, the Court has no occasion to consider whether they allege § 3(b) boycotts.

get[s]." *Post*, at 808 (citations and internal quotation marks omitted). But it fails to acknowledge several crucial features of these events that bind them into a single course of action recognizable as a § 3(b) boycott.

First, the allegation that the reinsurers acted at the behest of the four primary insurers excludes the possibility that the reinsurers acted entirely in their own independent self-interest, and would have taken exactly the same course of action without the intense efforts of the four primary insurers. Although the majority never explicitly posits such autonomy on the part of the reinsurers, this would seem to be the only point of its repeated emphasis on the fact that "the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured." *Ibid.* If the encouragement of the four primary insurers played no role in the reinsurers' decision to act as they did, then it is difficult to see how one could describe the reinsurers as acting at the behest of the primary insurers, an element I find crucial to the § 3(b) boycott alleged here. From the vantage point of a ruling on motions to dismiss, however, I discern sufficient allegations in the complaints that this is not the case. In addition, according to the complaints, the four primary insurers were not acting out of concern for the reinsurers' financial health when they prompted the reinsurers to refuse reinsurance for certain risks; rather, they simply wanted to ensure that no other primary insurer would be able to sell insurance policies that they did not want to sell. Finally, as the complaints portray the business of insurance, reinsurance is a separate, specialized product, "[t]he availability [of which] affects the ability and willingness of primary insurers to provide insurance to their customers." App. 18 (Cal. Complaint ¶ 34). Thus, contrary to the majority's assertion, the boundary between the primary insurance industry and the reinsurance industry is not merely "technica[l]." *Post*, at 808.

The majority insists that I "disregar[d] th[e] integral relationship between the terms of the primary insurance form and the contract of reinsurance," *post*, at 807, a fact which it seems to believe makes it impossible to draw any distinction whatsoever between primary insurers and reinsurers. Yet it is the majority that fails to see that, in spite of such an "integral relationship," the interests of primary insurer and reinsurer will almost certainly differ in some cases. For example, the complaints allege that reinsurance contracts often "layer" risks, "in the sense that [a] reinsurer may have to respond only to claims above a certain amount . . . ." App. 10 (Cal. Complaint ¶ 4.q); *id.*, at 61 (Conn. Complaint ¶ 4(f)). Thus, a primary insurer might be much more concerned than its reinsurer about a risk that resulted in a high number of relatively small claims. Or the primary insurer might simply perceive a particular risk differently from the reinsurer. The reinsurer might be indifferent as to whether a particular risk was covered, so long as the reinsurance premiums were adjusted to its satisfaction, whereas the primary insurer might decide that the risk was "too hot to handle," on a standardized basis, at any cost. The majority's suggestion that "to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way 'artificial,'" *post*, at 808; see *post*, at 806, simply ignores these possibilities; the conditions could quite easily be "artificial," in the sense that they are not motivated by the interests of the reinsurers themselves. Because the parties have had no chance to flesh out the facts of this case, because I have no *a priori* knowledge of those facts, and because I do not believe I can locate them in the pages of insurance treatises, I would not rule out these possibilities on a motion to dismiss.

Believing that there is no other principled way to narrow the § 3(b) exception, the majority decides that "boycott" encompasses just those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Post*, at 803. This designation of a single "'unitary phenom-

enon,'" *Barry*, 438 U. S., at 543, to which the term "boycott" will henceforth be confined, is of course at odds with our own description of our Sherman Act cases in *Barry*.[19] See *ibid.* Moreover, the limitation to "collateral" refusals to deal threatens to shrink the § 3(b) exception far more than the majority is willing to admit. Even if the reinsurers refused all reinsurance to primary insurers "who wrote insurance on disfavored forms," including insurance "as to risks written on other forms," the majority states, the reinsurers would not be engaging in a § 3(b) boycott if "the primary insurers' other business were relevant to the proposed insurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses)." *Post*, at 810 (emphasis deleted). Under this standard, and under facts comparable to those in this litigation, I assume that reinsurers who refuse to deal at all with a primary insurer unless it ceases insuring a particular risk would not be engaging in a § 3(b) boycott if they could show that (1) insuring the risk in question increases the probability that the primary insurer will become insolvent, and that (2) it costs more to administer the reinsurance contracts of a bankrupt primary insurer (including those unrelated to the risk that caused the primary insurer to declare bankruptcy). One can only imagine the variety of similar arguments that may slowly plug what remains of the § 3(b) exception. For these reasons, I cannot agree with the majority's narrow theory of § 3(b) boycotts.

III

Finally, we take up the question presented by No. 91–1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sher-

[19] The majority contends that its concept of boycott is still "multifaceted" because it can be modified by such adjectives as "punitive," "labor," "political," and "social." *Post*, at 804, n. 3. This does not hide the fact that it is attempting to concoct a "precise definition" of the term, *post*, at 800, composed of a simple set of necessary and sufficient conditions.

man Act to foreign conduct. The Fifth Claim for Relief in the California Complaint alleges a violation of § 1 of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." App. 43–44 (¶¶ 131–135). The Sixth Claim for Relief in the California Complaint alleges that the London reinsurers violated § 1 by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." *Id.*, at 45–46 (¶¶ 136–140). The Eighth Claim for Relief in the California Complaint alleges a further § 1 violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California.[20] *Id.*, at 47–48 (¶¶ 146–150).

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained").[21] Although the

[20] As we have noted, see *supra*, at 776–777, each of these claims has a counterpart in the Connecticut Complaint. The claims each name different groups of London reinsurers, and not all of the named defendants are petitioners in No. 91–1128; but nothing in our analysis turns on these variations.

[21] One of the London reinsurers, Sturge Reinsurance Syndicate Management Limited, argues that the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts. Brief for Petitioner

proposition was perhaps not always free from doubt, see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 582, n. 6 (1986); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (CA2 1945) (L. Hand, J.); Restatement (Third) of Foreign Relations Law of the United States § 415, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236 (1978); cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962); *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 288 (1952); *United States* v. *Sisal Sales Corp.*, 274 U. S. 268, 275–276 (1927).[22] Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.[23] See 938 F. 2d, at 933.

Sturge Reinsurance Syndicate Management Ltd. in No. 91–1128, p. 22. Sturge may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to and did in fact produce a substantial effect on the American insurance market.

[22] JUSTICE SCALIA believes that what is at issue in this litigation is prescriptive, as opposed to subject-matter, jurisdiction. *Post*, at 813–814. The parties do not question prescriptive jurisdiction, however, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act. See G. Born & D. Westin, International Civil Litigation in United States Courts 542, n. 5 (2d ed. 1992) (Sherman Act is a "prime exampl[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction").

[23] Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U. S. C. § 6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. § 6a(1)(A). The FTAIA was intended to exempt from the Sherman Act

According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity.[24] The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. *Id.*, at 932. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline

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export transactions that did not injure the United States economy, see H. R. Rep. No. 97–686, pp. 2–3, 9–10 (1982); P. Areeda & H. Hovenkamp, Antitrust Law ¶ 236'a, pp. 296–297 (Supp. 1992), and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it. See *id.*, ¶ 236'a, p. 297. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.

[24] JUSTICE SCALIA contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. *Post*, at 817–818. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (CA2 1945) ("[I]t follows from what we have . . . said that [the agreements at issue] were unlawful [under the Sherman Act], though made abroad, if they were intended to affect imports and did affect them"); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294 (CA3 1979) (once court determines that jurisdiction exists under the Sherman Act, question remains whether comity precludes its exercise); H. R. Rep. No. 97–686, *supra*, at 13. But cf. *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597, 613 (CA9 1976); 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 166 (1981). In any event, the parties conceded jurisdiction at oral argument, see *supra*, at 795, and we see no need to address this contention here.

exercise of jurisdiction." *Id.*, at 933 (citation omitted). But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this litigation. *Id.*, at 934.

When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97–686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing *Timberlane*). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as JUSTICE SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 555 (1987) (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. See Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91–1128, pp. 22–27; Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 10–14. They assert that Parliament has established a com-

prehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law § 415, Comment *j*; see *Continental Ore Co.*, *supra*, at 706–707. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." Restatement (Third) Foreign Relations Law § 403, Comment *e*.[25] Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91–1128, pp. 7–8, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See Restatement (Third) Foreign Relations Law § 403, Comment *e*, § 415, Comment *j*. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[25] JUSTICE SCALIA says that we put the cart before the horse in citing this authority, for he argues it may be apposite only after a determination that jurisdiction over the foreign acts is reasonable. *Post*, at 821. But whatever the order of cart and horse, conflict in this sense is the only substantial issue before the Court.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II.*

With respect to the petition in No. 91–1111, I join the Court's judgment and Parts I and II–A of its opinion. I write separately because I do not agree with JUSTICE SOUTER's analysis, set forth in Part II–B of his opinion, of what constitutes a "boycott" for purposes of § 3(b) of the McCarran-Ferguson Act, 15 U. S. C. § 1013(b). With respect to the petition in No. 91–1128, I dissent from the Court's ruling concerning the extraterritorial application of the Sherman Act. Part I below discusses the boycott issue; Part II extraterritoriality.

I

Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present cases requires precise definition of the word "boycott."[1] It is a relatively new word, little more than a century old. It was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland. The Land League, an Irish organization formed the previous year, had demanded that landlords reduce their rents and had urged tenants to avoid dealing with those who failed to do so. Boycott did not bend to the demand and instead ordered evictions. In retaliation, the tenants "sen[t] Captain Boycott to Coventry in a very thorough manner." J. McCarthy, England Under Gladstone 108 (1886). "The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent

*JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join this opinion in its entirety, and THE CHIEF JUSTICE joins Part I of this opinion.

[1] Section 3(b) of the McCarran-Ferguson Act, 15 U. S. C. § 1013(b), provides:

"Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

it, not to allow any one else to have anything to do with him. . . . [T]he awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one would supply him with food." *Id.*, at 108–109; see also H. Laidler, Boycotts and the Labor Struggle 23–27 (1968). Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." 2 Oxford English Dictionary 468 (2d ed. 1989).

Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was concededly not the case here. Brief for Petitioners in No. 91–1111, p. 31; see also Reply Brief for Petitioners in No. 91–1111, pp. 12–13. We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or *coerce him into abandoning it.*" The refusal to deal may, in other words, be *conditional*, offering its target the incentive of renewed dealing if and when he mends his ways. This is often the case—and indeed seems to have been the case with the original Boycott boycott. Cf. McCarthy, *supra*, at 109 (noting that the Captain later lived "at peace" with his neighbors). Furthermore, other dictionary definitions extend the term to include a *partial* boycott—a refusal to engage in some, but not all, transactions with the target. See Webster's New International Dictionary 321 (2d ed. 1950) (defining "boycott" as "to withhold, wholly *or in part*, social or business intercourse from, as an expression of disapproval or means of coercion" (emphasis added)).

It is, however, important—and crucial in the present cases—to distinguish between a conditional boycott and a concerted agreement to seek particular terms in particular

transactions. A concerted agreement to terms (a "cartelization") is "a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." L. Sullivan, Law of Antitrust 257 (1977). The parties to such an agreement (the members of a cartel) are not engaging in a boycott, because:

> "They are not coercing anyone, at least in the usual sense of that word; they are merely (though concertedly) saying *'we will deal with you only on the following trade terms.'*
>
> ". . . Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a 'boycott' because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agreement would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion." *Ibid.* (emphasis added).

Thus, if Captain Boycott's tenants had agreed among themselves that they would refuse to renew their leases unless he reduced his rents, that would have been a concerted agreement on the terms of the leases, but not a boycott.[2] The tenants, of course, did more than that; they refused to engage in other, unrelated transactions with Boycott—*e. g.*, selling him food—unless he agreed to their terms on rents. It is

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[2] Under the Oxford English Dictionary definition, of course, this example would not be a "boycott" because the tenants had not suspended *all* relations with the Captain. But if one recognizes partial boycotts (as we and JUSTICE SOUTER do), and if one believes (as JUSTICE SOUTER does but we do not) that the purpose of a boycott can be to secure different terms in the very transaction that is the supposed subject of the boycott, then it is impossible to explain why this is not a boycott. Under JUSTICE SOUTER's reasoning, it *would* be a boycott, at least if the tenants acted "at the behest of" (whatever *that* means), *ante*, at 792, the Irish Land League. This hypothetical shows that the problems presented by partial boycotts (which we agree fall within § 3(b)) make more urgent the need to distinguish boycotts from concerted agreements on terms.

this expansion of the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.

The proper definition of "boycott" is evident from the Court's opinion in *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600 (1914), which is recognized in the antitrust field as one of the "leading case[s] involving commercial boycotts." Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 873 (1955). The associations of retail lumber dealers in that case refused to buy lumber from wholesale lumber dealers who sold directly to consumers. The boycott attempted "to impose as a condition . . . on [the wholesale dealers'] trade that they shall not sell in such manner that a local retailer may regard such sale as an infringement of his exclusive right to trade." 234 U. S., at 611. We held that to be an "'artificial conditio[n],'" since "the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations." *Id.*, at 611–612. In other words, the associations' activities were a boycott because they sought an objective—the wholesale dealers' forbearance from retail trade—that was collateral to their transactions with the wholesalers.

Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts. For example, in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930), and *United States* v. *First Nat. Pictures, Inc.*, 282 U. S. 44 (1930), we held unreasonable an agreement among competing motion picture distributors under which they refused to license films to exhibitors except on standardized terms. We also found unreasonable the restraint of trade in *Anderson* v. *Shipowners Assn. of Pacific Coast*, 272 U. S. 359 (1926), which involved an attempt by an association of

employers to establish industry-wide terms of employment. These sorts of concerted actions, similar to what is alleged to have occurred here, are not properly characterized as "boycotts," and the word does not appear in the opinions.[3] In fact, in the 65 years between the coining of the word and enactment of the McCarran-Ferguson Act in 1945, "boycott" appears in only seven opinions of this Court involving commercial (nonlabor) antitrust matters, and *not once* is it used as JUSTICE SOUTER uses it—to describe a concerted refusal to engage in particular transactions until the terms of those transactions are agreeable.[4]

In addition to its use in the antitrust field, the concept of "boycott" frequently appears in labor law, and in this context as well there is a clear distinction between boycotts and concerted agreements seeking terms. The ordinary strike

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[3] JUSTICE SOUTER points out that the Court in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978), found the term "boycott" "does not refer to '"a unitary phenomenon,"'" *ante*, at 788 (quoting *Barry*, *supra*, at 543 (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974))), and asserts that our position contradicts this. *Ante*, at 793–794. But to be not a "unitary phenomenon" is different from being an all-encompassing one. "Boycott" is a multifaceted "phenomenon" that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc. It merely does *not* include refusals to deal because of objections to proposed terms.

[4] See *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 295–296, 298 (1945) (refusal to engage in *all* transactions with targeted companies unless they agreed to defendants' price-fixing scheme); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 535, 536, 562 (1944) (discussed *infra*, at 808–809); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 722 (1944) (word used in reference to a refusal to deal as means of enforcing resale price maintenance); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 461, 465, 467 (1941) (boycott of retailers who sold competitors' products); *United States* v. *American Livestock Commission Co.*, 279 U. S. 435, 436–438 (1929) (absolute boycott of a competing livestock association, intended to drive it out of business); *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 610–611 (1914) (discussed *supra*, at 803); *Nash* v. *United States*, 229 U. S. 373, 376 (1913) (word used in passing).

seeking better contract terms is a "refusal to deal"—*i. e.*, union members refuse to sell their labor until the employer capitulates to their contract demands. But no one would call this a boycott, because the conditions of the "refusal to deal" relate directly to the terms of the refused transaction (the employment contract). A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. This distinction is well illustrated by the famous boycott of Pullman cars by Eugene Debs' American Railway Union in 1894. The incident began when workers at the Pullman Palace Car Company called a strike, but the "boycott" occurred only when other members of the American Railway Union, not Pullman employees, supported the strikers by refusing to work on any train drawing a Pullman car. See *In re Debs*, 158 U. S. 564, 566–567 (1895) (statement of the case); H. Laidler, Boycotts and the Labor Struggle 100–108 (1968). The refusal to handle Pullman cars had nothing to do with Pullman cars themselves (working on Pullman cars was no more difficult or dangerous than working on other cars); rather, it was in furtherance of the collateral objective of obtaining better employment terms for the Pullman workers. In other labor cases as well, the term "boycott" invariably holds the meaning that we ascribe to it: Its goal is to alter, not the terms of the refused transaction, but the terms of workers' employment.[5]

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[5] See, *e. g.*, *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37, 47, 49 (1927) (refusal to work on stone received from nonunion quarries); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 462–463 (1921) (boycott of target's product until it agreed to union's employment demands); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911) (boycott of company's products because of allegedly unfair labor practices); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) (boycott of fur hats made by a company that would not allow its workers to be unionized). See also *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 503–505 (1940) (distinguishing between ordinary strikes and boycotts).

The one case in which we have found an activity to constitute a "boycott" within the meaning of the McCarran-Ferguson Act is *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978). There the plaintiffs were licensed physicians and their patients, and the defendant (St. Paul) was a malpractice insurer that had refused to renew the physicians' policies on an "occurrence" basis, but insisted upon a "claims made" basis. The allegation was that, at the instance of St. Paul, the three other malpractice insurers in the State had collectively refused to write insurance for St. Paul's customers, thus forcing them to accept St. Paul's renewal terms. Unsurprisingly, we held the allegation sufficient to state a cause of action. The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was "artificial": it bore no relationship (or an "artificial" relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors.

Under the standard described, it is obviously not a "boycott" for the reinsurers to "refus[e] to reinsure coverages written on the ISO CGL forms until the desired changes were made," *ante*, at 788, because the terms of the primary coverages are central elements of the reinsurance contract—they are *what* is reinsured. See App. 16–17 (Cal. Complaint ¶¶ 26–27). The "primary policies are . . . the basis of the losses that are shared in the reinsurance agreements." 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, Principles of Reinsurance 87 (1990); see also *id.*, at 55; Gurley, Regulation of Reinsurance in the United States, 19 Forum 72, 73 (1983). Indeed, reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurer's policyholders. See *id.*, at 73–74; *Colonial American Life Ins. Co.* v. *Commissioner*, 491 U. S. 244, 247 (1989); B. Ostrager & T. Newman, Handbook on Insurance Coverage

Disputes chs. 15–16 (5th ed. 1992). And in the other category of reinsurance (indemnity reinsurance), either the terms of the underlying insurance policy are incorporated by reference (if the reinsurance is written under a facultative agreement), see J. Butler & R. Merkin, Reinsurance Law B.1.1–04 (1992); R. Carter, Reinsurance 235 (1979), or (if the reinsurance is conducted on a treaty basis) the reinsurer will require full disclosure of the terms of the underlying insurance policies and usually require that the primary insurer not vary those terms without prior approval, see *id.*, at 256, 297.

JUSTICE SOUTER simply disregards this integral relationship between the terms of the primary insurance form and the contract of reinsurance. He describes the reinsurers as "individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it." *Ante*, at 788. While this factual assumption is crucial to JUSTICE SOUTER's reasoning (because otherwise he would not be able to distinguish permissible agreements among primary insurers), he offers no support for the statement. But even if it happens to be true, he does not explain why it *must* be true—that is, why the law must exclude reinsurers from full membership and participation. The realities of the industry may make explanation difficult:

> "Reinsurers also benefit from the services by ISO and other rating or service organizations. The underlying rates and policy forms are the basis for many reinsurance contracts. Reinsurers may also subscribe to various services. For example, a facultative reinsurer may subscribe to the rating service, so that they have the rating manuals available, or purchase optional services, such as a sprinkler report for a specific property location." 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 18 (1990).

JUSTICE SOUTER also describes reinsurers as being "outside the primary insurance industry." *Ante*, at 789. That is technically true (to the extent the two symbiotic industries can be separated) but quite irrelevant. What matters is that the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" by reinsurance, Carter, *supra*, at 4, so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a number of reinsurers to insist upon such terms jointly is in no way a "boycott."[6]

JUSTICE SOUTER seems to believe that a nonboycott is converted into a boycott by the fact that it occurs "at the behest of," *ante*, at 789, or is "solicited" by, *ibid.*, competitors of the target. He purports to find support for this implausible proposition in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), which involved a classic boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy, the South-Eastern Underwriters Association (S. E. U. A.). The conspirators would not deal with independent agents who wrote for such companies, and would not write policies for customers who insured with them. See *id.*, at 535–536. Moreover, Justice Black's opinion for the Court noted cryptically, "[c]ompanies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks." *Id.*, at 535. JUSTICE SOUTER speculates

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[6] Once it is determined that the actions of the reinsurers did not constitute a "boycott," but rather a concerted agreement to terms, it follows that their actions do not constitute "coercion" or "intimidation" within the meaning of the statute. That is because, as previously mentioned, such concerted agreements do "not coerc[e] anyone, at least in the usual sense of that word," L. Sullivan, Law of Antitrust 257 (1977), and because they are precisely what is protected by McCarran-Ferguson immunity.

that "the *[S. E. U. A.]* defendants could have [managed to cut the targets off from reinsurance] by prompting reinsurance companies to refuse to deal with nonmembers." *Ante*, at 789. Even assuming that is what happened, all that can be derived from *S. E. U. A.* is the proposition that one who prompts *a boycott* is a co-conspirator with the boycotters. For *with or without the defendants' prompting*, the reinsurers' refusal to deal in *S. E. U. A.* was a boycott, membership in the association having no discernible bearing upon the terms of the refused reinsurance contracts.

JUSTICE SOUTER suggests that we have somehow mistakenly "posit[ed] . . . autonomy on the part of the reinsurers." *Ante*, at 792. We do not understand this. Nothing in the complaints alleges that the reinsurers were deprived of their "autonomy," which we take to mean that they were coerced by the primary insurers. (Given the sheer size of the Lloyd's market, such an allegation would be laughable.) That is not to say that we disagree with JUSTICE SOUTER's contention that, according to the allegations, the reinsurers would not "have taken exactly the same course of action without the intense efforts of the four primary insurers." *Ibid.* But the same could be said of the participants in virtually all conspiracies: If they had not been enlisted by the "intense efforts" of the leaders, their actions would not have been the same. If this factor renders otherwise lawful conspiracies (under McCarran-Ferguson) illegal, then the Act would have a narrow scope indeed.

Perhaps JUSTICE SOUTER feels that it is undesirable, as a policy matter, to allow insurers to "prompt" reinsurers not to deal with the insurers' competitors—*whether or not* that refusal to deal is a boycott. That feeling is certainly understandable, since under the normal application of the Sherman Act the reinsurers' concerted refusal to deal would be an unlawful conspiracy, and the insurers' "prompting" could make them part of that conspiracy. The McCarran-

Ferguson Act, however, makes that conspiracy lawful (assuming reinsurance is state regulated), unless the refusal to deal is a "boycott."

Under the test set forth above, there are sufficient allegations of a "boycott" to sustain the relevant counts of complaint against a motion to dismiss. For example, the complaints allege that some of the defendant reinsurers threatened to "withdra[w] entirely from the business of reinsuring primary U. S. insurers who wrote on the occurrence form." App. 31 (Cal. Complaint ¶ 89), *id.*, at 83 (Conn. Complaint ¶ 93). Construed most favorably to respondents, that allegation claims that primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, *even* as to risks written on *other forms.* If that were the case, the reinsurers might have been engaging in a boycott—they would, that is, unless the primary insurers' other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses). Cf. Gonye, Underwriting the Reinsured, in Reinsurance 439, 463–466 (R. Strain ed. 1980); 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 21–23 (1990) (same). Other allegations in the complaints could be similarly construed. For example, the complaints also allege that the reinsurers "threatened a boycott of North American CGL risks," not just CGL risks containing dissatisfactory terms, App. 26 (Cal. Complaint ¶ 74), *id.*, at 79 (Conn. Complaint ¶ 78); that "the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance," *id.*, at 29 (Cal. Complaint ¶ 82), *id.*, at 81–82 (Conn. Complaint ¶ 86); that some of the defendant insurers and reinsurers told "groups of insurance brokers and agents . . . that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the [revised] ISO forms were not ap-

proved," *id.*, at 29 (Cal. Complaint ¶ 85), *id.*, at 82 (Conn. Complaint ¶ 89).

Many other allegations in the complaints describe conduct that may amount to a boycott if the plaintiffs can prove certain additional facts. For example, General Re, the largest American reinsurer, is alleged to have "agreed to either coerce ISO to adopt [the defendants'] demands or, failing that, 'derail' the entire CGL forms program." *Id.*, at 24 (Cal. Complaint ¶ 64), *id.*, at 77 (Conn. Complaint ¶ 68). If this means that General Re intended to withhold all reinsurance on all CGL forms—even forms having no objectionable terms—that might amount to a "boycott." Also, General Re and several other domestic reinsurers are alleged to have "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms." *Id.*, at 25 (Cal. Complaint ¶ 66), *id.*, at 78 (Conn. Complaint ¶ 70). Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on *either* form until *both* were changed to their liking. Again, that might amount to a boycott. "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232, 246 (1980) (quoting *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957)). Under that standard, these allegations are sufficient to sustain the First, Second, Third, and Fourth Claims for Relief in the California Complaint and the First and Second Claims for Relief in the Connecticut Complaint.[7]

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[7] We agree with JUSTICE SOUTER's conclusion, *ante*, at 790–791, n. 18, that the Seventh Claim for Relief in the California Complaint and the Sixth Claim for Relief in the Connecticut Complaint fail to allege any § 3(b) boycotts.

II

Petitioners in No. 91–1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act.[8] It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U. S. C. § 1331 vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), make clear, that is sufficient to establish the District Court's jurisdiction over these claims. *Lauritzen* involved a Jones Act claim brought by a foreign sailor against a foreign shipowner. The shipowner contested the District Court's jurisdiction, see *id.*, at 573, apparently on the grounds that the Jones Act did not govern the dispute between the foreign parties to the action. Though ultimately agreeing with the shipowner that the Jones Act did not apply, see discussion *infra*, at 816, the Court held that the District Court had jurisdiction.

> "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." 345 U. S., at 575.

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[8] The counts at issue in this litigation are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint. See App. 43–46 (¶¶ 131–140), *id.*, at 47–49 (¶¶ 146–150).

See also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359 (1959).

The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) *(Aramco)* ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction—want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute. See *Romero*, *supra*, at 384 (holding no claim available under the Jones Act); *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 359 (1909) (holding that complaint based upon foreign conduct "alleges no case under the [Sherman Act]").

There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction," *Aramco*, *supra*, at 253; Restatement (First) Conflict of Laws § 60 (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see *id.*, at 231. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "[t]o regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United

States interests are affected. See *Ford* v. *United States*, 273 U. S. 593, 621–623 (1927); *United States* v. *Bowman*, 260 U. S. 94, 98–99 (1922); *American Banana*, *supra*, at 356. But the question in this litigation is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco*, *supra*, at 248 (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). Applying that canon in *Aramco*, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, 42 U. S. C. §§ 2000e to 2000e–17 (1988 ed.), did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "'any activity, business, or industry in commerce.'" *Id.*, at 249 (quoting 42 U. S. C. § 2000e(h)). We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. *Id.*, at 251; see also *id.*, at 251–253. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 582, n. 6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962); see also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (CA2 1945).

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "[A]n act of congress

ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.). This canon is "wholly independent" of the presumption against extraterritoriality. *Aramco*, *supra*, at 264 (Marshall, J., dissenting). It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401–416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. See *id.*, at 383. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." *Id.*, at 382–383. "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." *Id.*, at 383.

Romero referred to, and followed, the choice-of-law analysis set forth in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953). As previously mentioned, *Lauritzen* also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The *Lauritzen* Court recognized the basic problem: "If [the Jones Act were] read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment.'" *Id.*, at 576. The solution it adopted was to construe the statute "to apply only to areas and transactions in which *American law would be considered operative under prevalent doctrines of international law.*" *Id.*, at 577 (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon—of course—Chief Justice Marshall's statement in *Schooner Charming Betsy*, quoted *supra*, at 814–815. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim." 345 U. S., at 583; see *id.*, at 583–593 (discussing factors). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 21–22 (1963) (applying *Schooner Charming Betsy* principle to restrict application of National Labor Relations Act to foreign-flag vessels).

Lauritzen, *Romero*, and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be construed in light of international law in other areas as well. See, *e. g.*, *Sale* v. *Haitian Centers Council, Inc.*, *ante*, at 178, n. 35; *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982). More specifically, the principle was expressed in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (CA2 1945), the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman]

Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" *Id.*, at 443.

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." See *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597, 608–615 (CA9 1976); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294–1298 (CA3 1979); *Montreal Trading Ltd.* v. *Amax Inc.*, 661 F. 2d 864, 869–871 (CA10 1981); *Laker Airways Limited* v. *Sabena, Belgian World Airlines*, 235 U. S. App. D. C. 207, 236, and n. 109, 731 F. 2d 909, 938, and n. 109 (1984); see also *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 131 U. S. App. D. C. 226, 236, and n. 31, 404 F. 2d 804, 814, and n. 31 (1968). The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict of Laws §38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"). Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. *Romero, supra*, at 382–383; see also *Lauritzen, supra*, at 578–579; *Hilton* v. *Guyot*, 159 U. S. 113, 162–166 (1895). Considering comity in

this way is just part of determining whether the Sherman Act prohibits the conduct at issue.[9]

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen*, *Romero*, and *McCulloch*) and in the decisions of other federal courts, especially *Timberlane*. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," *id.*, § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the

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[9] Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the "comity of courts," which has led them to characterize the question presented as one of "abstention," that is, whether they should "exercise or decline jurisdiction." *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294, 1296 (CA3 1979); see also *In re Insurance Antitrust Litigation*, 938 F. 2d 919, 932 (CA9 1991). As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.

activity to be regulated," *id.*, § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," *id.*, § 403(2)(g); and "the likelihood of conflict with regulation by another state," *id.*, § 403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States.[10] Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, § 403(2)(g). See 938 F. 2d, at 932–933; *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 487–488 (ND Cal. 1989); see also J. Butler & R. Merkin, Reinsurance Law A.1.1–02 (1992). Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b)—suggesting that "the importance of regulation to the [United States]," Restatement (Third) § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

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[10] Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "[t]he interests of Britain are at least diminished where the parties are subsidiaries of American corporations." *Id.*, at 933. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.

It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," *ante*, at 798, rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. See *ante*, at 796, n. 22; *ante*, at 797, n. 24. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before. See the excerpt from *Lauritzen* quoted *supra*, at 812; see also *Romero*, 358 U. S., at 359. It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true conflict" counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a *violation* of another country's law. *Ante*, at 798–799. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.

In the sense in which the term "conflic[t]" was used in *Lauritzen*, 345 U. S., at 582, 592, and is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here, like the defendant in *Lauritzen*, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. See *id.*, at 575–576 (detailing the differences between foreign and

United States law). Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary. See generally R. Weintraub, Commentary on Conflict of Laws 2–3 (1980); Restatement (First) of Conflict of Laws § 1, Comment *c* and Illustrations (1934).

Literally the *only* support that the Court adduces for its position is § 403 of the Restatement (Third)—or more precisely Comment *e* to that provision, which states:

> "Subsection (3) [which says that a State should defer to another state if that State's interest is clearly greater] applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."

The Court has completely misinterpreted this provision. Subsection (3) of § 403 (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of § 403 has been complied with—*i. e.*, after it has been determined that the exercise of jurisdiction by *both* of the two States is not "unreasonable." That prior question is answered by applying the factors *(inter alia)* set forth in subsection (2) of § 403, that is, precisely the factors that I have discussed in text and that the Court rejects.[11]

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[11] The Court skips directly to subsection (3) of § 403, apparently on the authority of Comment *j* to § 415 of the Restatement (Third). See *ante*, at 799. But the preceding commentary to § 415 makes clear that "[a]ny exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in § 403(2). Restatement (Third) § 415, Comment *a*. Comment *j* refers back to the conflict analysis set forth in § 403(3), which, as noted above, comes after the reasonableness analysis of § 403(2).

* * *

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91–1128.

Per Curiam

DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* BLAIR

ON APPLICATION TO VACATE STAY OF EXECUTION

No. A–69. Decided July 21, 1993

Held: The Court of Appeals' stay of execution is vacated. It is an abuse of discretion for a federal court to interfere with the orderly process of a State's criminal justice system in a habeas case raising claims that are for all relevant purposes indistinguishable from those that this Court recently rejected in *Herrera* v. *Collins*, 506 U. S. 390.

PER CURIAM.

The application to vacate the stay of execution presented to JUSTICE BLACKMUN has been referred to the Court.

Applying the prevailing legal standard, it is "particularly egregious" to enter a stay on second or subsequent habeas petitions unless "there are substantial grounds upon which relief might be granted." *Herrera* v. *Collins*, 506 U. S. 390, 425, 426 (1993) (O'CONNOR, J., joined by KENNEDY, J., concurring) (internal quotation marks omitted). No substantial grounds were presented in the present case. The District Court stated that the "facts in *Herrera* mirror those in the present case." No. 93–0674–CV–1 (WD Mo., July 19, 1993). This assessment was not even questioned by the Court of Appeals, and is obviously correct. There is therefore no conceivable need for the Court of Appeals to engage in "more detailed study" over the next five weeks to resolve this claim. See 999 F. 2d 1219 (CA8 1993).

It is an abuse of discretion for a federal court to interfere with the orderly process of a State's criminal justice system in a case raising claims that are for all relevant purposes indistinguishable from those we recently rejected in *Herrera*. Accordingly, the Court of Appeals' stay must be vacated.

JUSTICE SOUTER would deny the application to vacate the stay.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Court errs twice in granting the State's application to vacate the Court of Appeals' stay of execution. First, it errs by affording insufficient deference to the Court of Appeals' decision. Second, it errs by letting stand the District Court's decision, which was itself erroneous.

I

"The standard under which we consider motions to vacate stays of execution is deferential, and properly so. Only when the lower courts have clearly abused their discretion in granting a stay should we take the extraordinary step of overturning such a decision." *Dugger* v. *Johnson*, 485 U. S. 945, 947 (1988) (O'CONNOR, J., joined by REHNQUIST, C. J., dissenting). Accord, *Barefoot* v. *Estelle*, 463 U. S. 880, 896 (1983); *Wainwright* v. *Spenkelink*, 442 U. S. 901, 905 (1979) (REHNQUIST, J., dissenting). In this case, the Court of Appeals granted a temporary stay of execution to allow it time properly to consider Blair's appeal. In my view, its decision to do so does not constitute an abuse of discretion.

The State likens this case to *Delo* v. *Stokes*, 495 U. S. 320 (1990), in which this Court vacated a stay of execution because the prisoner's habeas petition "clearly constitute[d] an abuse of the writ." *Id.*, at 321. Although the habeas petition currently before the Court of Appeals is Blair's third, the abuse of the writ doctrine cannot serve as the basis for vacating this stay. Blair's principal contention in his federal habeas petition is that he is actually innocent, and this Court has recognized an exception to the abuse of the writ doctrine where a habeas petitioner can show that he probably is innocent. See *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991).

II

The Court's second error is that it lets stand the District Court's decision denying Blair's claim without an evidentiary hearing. In *Herrera* v. *Collins*, 506 U. S. 390 (1993), this Court assumed that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.*, at 417. The Court provided little guidance about what sort of showing would be "truly persuasive." Yet despite the uncertain contours of this constitutional right, federal courts have an obligation to treat actual-innocence claims just as they would any other constitutional claim brought pursuant to 28 U. S. C. § 2254. The rules governing federal habeas, not addressed by the *Herrera* majority, provide that "[a] district court may summarily dismiss a habeas petition only if 'it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief.' 28 U. S. C. § 2254 Rule 4." 506 U. S., at 445 (dissenting opinion). "If . . . the petition raises factual questions and the State has failed to provide a full and fair hearing, the district court is *required* to hold an evidentiary hearing." *Id.*, at 441 (emphasis added), citing *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963).

In this case, Blair has submitted seven affidavits tending to show that he is innocent of the crime for which he has been sentenced to death. The State does not dispute that no state court remains open to hear Blair's claim. Because Blair's affidavits raise factual questions that cannot be dismissed summarily, the District Court erred in denying petitioner's claim without an evidentiary hearing.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 825 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 21 THROUGH OCTOBER 1, 1993

JUNE 21, 1993

Certiorari Granted—Vacated and Remanded

No. 91–1347. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF UNION INDEMNITY INSURANCE COMPANY OF NEW YORK *v.* UNITED STATES. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Department of Treasury* v. *Fabe*, 508 U. S. 491 (1993). Reported below: 170 App. Div. 2d 342, 566 N. Y. S. 2d 853.

No. 92–1436. TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY ET AL. *v.* FUQUA INDUSTRIES, INC. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602 (1993). Reported below: 981 F. 2d 1248.

No. 92–7897. BILLY-EKO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed May 28, 1993. Reported below: 968 F. 2d 281.

No. 92–8231. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crosby* v. *United States*, 506 U. S. 255 (1993). Reported below: 983 F. 2d 1059.

Miscellaneous Orders

No. 92–1074. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* HARRIS TRUST & SAVINGS BANK, AS TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2. C. A. 2d Cir. [Certiorari granted, 507 U. S. 983.] Motion of the Solicitor General for leave

to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–1223. UNITED STATES DEPARTMENT OF DEFENSE ET AL. *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 5th Cir. [Certiorari granted, 507 U. S. 1003.] Motion of National Right to Work Legal Defense Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 92–1441. STAPLES *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 508 U. S. 939.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 92–1637. IBARRA, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* DUC VAN LE. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–8425. JONES *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [508 U. S. 949] denied.

No. 92–8484. IN RE DAY. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 12, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petition for writ of mandamus.

No. 92–8532. ANTONELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 12, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 92–8351. IN RE SOHLER;

No. 92–8469. IN RE VELASQUEZ; and

No. 92–8588. IN RE DIVITO. Petitions for writs of mandamus denied.

Certiorari Granted

No. 92–1214. MILLIGAN-JENSEN *v.* MICHIGAN TECHNOLOGICAL UNIVERSITY. C. A. 6th Cir. Certiorari granted. Reported below: 975 F. 2d 302.

No. 92–1450. WATERS ET AL. *v.* CHURCHILL ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 977 F. 2d 1114.

No. 92–1639. CITY OF CHICAGO ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 985 F. 2d 303.

No. 92–1750. FOGERTY *v.* FANTASY, INC. C. A. 9th Cir. Certiorari granted. Reported below: 984 F. 2d 1524.

Certiorari Denied

No. 92–216. SENN ET AL. *v.* UNITED DOMINION INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 806.

No. 92–718. MORRIS *v.* HILL. C. A. 6th Cir. Certiorari denied. Reported below: 962 F. 2d 1209.

No. 92–913. BANCO ESPANOL DE CREDITO ET AL. *v.* SECURITY PACIFIC NATIONAL BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 51.

No. 92–1434. EDELMAN *v.* UNITED STATES; and
No. 92–1448. MANKO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 900.

No. 92–1489. MINES ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1068.

No. 92–1541. SHERMOEN ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 982 F. 2d 1312.

No. 92–1563. WATSON *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 983 F. 2d 1088.

No. 92–1568. UNIFIED SCHOOL DISTRICT NO. 501, SHAWNEE COUNTY, KANSAS *v.* SMITH ET AL., MINOR CHILDREN, BY THEIR

MOTHER AND NEXT FRIEND, SMITH, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 585.

No. 92–1574. CRAMER *v.* PENA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 232.

No. 92–1586. DEAN WITTER REYNOLDS, INC. *v.* HARRISON ET AL.; and

No. 92–1740. HARRISON ET AL. *v.* DEAN WITTER REYNOLDS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 873.

No. 92–1610. LONGO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 9.

No. 92–1616. LOCAL 32B–32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 982 F. 2d 845.

No. 92–1617. CATAWBA INDIAN TRIBE OF SOUTH CAROLINA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 982 F. 2d 1564.

No. 92–1621. PAYNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 980 F. 2d 148.

No. 92–1622. O'NEILL ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 965 F. 2d 1522.

No. 92–1635. LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–1640. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES ET AL. *v.* MARTINEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1039.

No. 92–1642. MOOREHOUSE *v.* GRAND RIVER DAM AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 529.

No. 92–1643. LIPPERT *v.* DELTA AIR LINES, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 609 So. 2d 1304.

No. 92–1645. CITY OF LOS ANGELES *v.* JACKSON. C. A. 9th Cir. Certiorari denied. Reported below: 975 F. 2d 648.

No. 92–1648. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* ALBERTI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 893.

No. 92–1650. CENTURY CENTRE PARTNERS, LTD. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 969 F. 2d 835.

No. 92–1655. DISTRICT OF COLUMBIA *v.* HANSFORD ET AL. Ct. App. Md. Certiorari denied. Reported below: 329 Md. 112, 617 A. 2d 1057.

No. 92–1659. XYZ CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 939.

No. 92–1661. WINKLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 992 F. 2d 1472.

No. 92–1682. LARISCEY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 981 F. 2d 1244.

No. 92–1712. WIGGINS *v.* VALENCIA. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1440.

No. 92–1713. LORAIN BOARD OF EDUCATION ET AL. *v.* OHIO DEPARTMENT OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 1141.

No. 92–1718. HAMILTON TAFT & CO. *v.* FEDERAL EXPRESS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 572.

No. 92–1720. BRADY ET AL. *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 596, 607 N. E. 2d 1060.

No. 92–1723. ORANGE COUNTY POLITICAL COALITION ET AL. *v.* ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1504.

No. 92–1728. TAYLOR ET AL. *v.* LIBERTY NATIONAL LIFE INSURANCE CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1279.

No. 92–1731. JOHNSON ET AL. *v.* LOS ANGELES COMMUNITY COLLEGE DISTRICT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–1732. MAYLE *v.* CALIFORNIA STATE LOTTERY COMMISSION ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–1733. JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JACKSON, ET AL. *v.* ZAPATA HAYNIE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 287.

No. 92–1736. MOSS *v.* PARKS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 736.

No. 92–1737. FREY *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 982 F. 2d 399.

No. 92–1739. NORMAN ET AL. *v.* REED ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 154 Ill. 2d 77, 607 N. E. 2d 1198.

No. 92–1748. ESTATE OF BOHN ET AL. *v.* WADDELL, DIRECTOR, DEPARTMENT OF REVENUE OF ARIZONA, ET AL.; and ABBOTT ET AL. *v.* WADDELL, DIRECTOR, DEPARTMENT OF REVENUE OF ARIZONA, ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 174 Ariz. 239, 848 P. 2d 324 (first case).

No. 92–1749. ICARD, TRUSTEE, ET AL. *v.* SARASOTA-MANATEE AIRPORT AUTHORITY. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 615 So. 2d 699.

No. 92–1753. ROOS *v.* BANCFIRST OF SULPHUR, OKLAHOMA. Ct. App. Okla. Certiorari denied.

No. 92–1769. SALMINEN *v.* FREDIN. Ct. App. Minn. Certiorari denied.

No. 92–1778. GRAHAM *v.* MENGEL, CLERK, SUPREME COURT OF OHIO, AND SECRETARY, OHIO BOARD OF BAR EXAMINERS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 1421.

No. 92–1801. DIVERSIFIED FOODS, INC., ET AL. *v.* FIRST NATIONAL BANK OF BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 985 F. 2d 27.

No. 92–1822. GACKENBACH *v.* DEXTER HYSOL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1409.

No. 92–1840. TORVIK, SUPERINTENDENT, DAYTON FORENSIC CENTER, ET AL. *v.* LEVINE. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 1506.

No. 92–1886. HUDDLESTON, TENNESSEE COMMISSIONER OF REVENUE, ET AL. *v.* BLOOMINGDALE'S BY MAIL LTD. Sup. Ct. Tenn. Certiorari denied. Reported below: 848 S. W. 2d 52.

No. 92–7562. KREUZHAGE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 92–7877. HOLLOMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 690.

No. 92–7978. DRAKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–8106. FERREIRA-CHAVES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–8122. ELLISON *v.* CONOCO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1196.

No. 92–8130. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1375.

No. 92–8137. BOYLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 851.

No. 92–8154. DODGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8157. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–8195. SCOTT *v.* UNITED STATES; and
No. 92–8226. VIERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–8216. CRAWFORD *v.* UNITED STATES; and
No. 92–8221. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 369.

No. 92–8233. KONIOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 622.

No. 92–8261. NEWTOP *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 92–8270. BAGGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1083.

No. 92–8273. TANTALO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8292. PHILLIPS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 608 So. 2d 778.

No. 92–8310. COBBS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–8326. BOYD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 839 P. 2d 1363.

No. 92–8415. TUAN ANH NGUYEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 844 P. 2d 176.

No. 92–8420. JOHNSON *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1413.

No. 92–8431. GWYNN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–8436. ERWIN *v.* CITY OF ANGELS CAMP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1076.

No. 92–8449. BORDERS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 844 S. W. 2d 49.

No. 92–8450. FUQUA *v.* BENOIT ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 613 So. 2d 15.

No. 92–8451. HARRIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1083.

No. 92–8452. FERENC *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–8462. WARD *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 578.

No. 92–8466. THOMPSON *v.* CEISEL. C. A. 8th Cir. Certiorari denied.

No. 92–8475. BARTON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 556.

No. 92–8477. PERTSONI *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 855.

No. 92–8478. LAND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 898, 426 S. E. 2d 370.

No. 92–8483. JOHNSON *v.* LYNCH ET AL. Ct. App. D. C. Certiorari denied.

No. 92–8488. HONKANEN *v.* DOYLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1258.

No. 92–8498. DAVILLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 236 Ill. App. 3d 367, 603 N. E. 2d 666.

No. 92–8500. LAWSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1081.

No. 92–8501. RODRIGUEZ ORTA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 232.

No. 92–8508. TOMASEK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 423 Pa. Super. 640, 616 A. 2d 720.

No. 92–8512. LLOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 879.

No. 92–8531. CRUTCHFIELD *v.* CIANCA. C. A. 11th Cir. Certiorari denied.

No. 92–8539. LEVI-MONTGOMERY *v.* ADKINS, ASSISTANT SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 92–8541. MICKLAS *v.* POPE ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 92–8551. VELARDE-GAVARETTE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 975 F. 2d 672.

No. 92–8570. DANIELSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 691, 838 P. 2d 729.

No. 92–8582. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 666.

No. 92–8583. JONES *v.* PILLSBURY CO. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 560.

No. 92–8592. MANNING *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 560.

No. 92–8595. FETZER ET UX. *v.* JUVENILE DEPARTMENT OF CURRY COUNTY, OREGON, ET AL. Ct. App. Ore. Certiorari denied. Reported below: 113 Ore. App. 233, 832 P. 2d 1276.

No. 92–8597. GREEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–8603. CARTER *v.* KEESEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 988 F. 2d 1210.

No. 92–8604. CRITES *v.* KAISER ALUMINUM & CHEMICAL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1055.

No. 92–8615. CLARK *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 487.

No. 92–8630. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 134.

No. 92–8635. TWYMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8648. PAYTON *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 121.

No. 92–8665. HEFLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 879.

No. 92–8678. ROGERS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1064.

No. 92–8683. BLACK *v.* KIRKPATRICK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1075.

No. 92–8716. SEATON *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1068.

No. 92–8735. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 86.

No. 92–8736. STANFIELD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 67 Wash. App. 1006.

No. 92–8740. FISHER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 845 P. 2d 1272.

No. 92–8742. NALBANTION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1264.

No. 92–8745. MORRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92–8746. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8747. WIRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 989 F. 2d 506.

No. 92–8748. DEMAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 92–8754. FRANCO-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1055.

No. 92–8755. JONES, AKA WHITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 489.

No. 92–8756. HORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 989 F. 2d 496.

No. 92–8758. IMOH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 992 F. 2d 319.

No. 92–8759. HOLBROOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 92–8760. GAVIRIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 774.

No. 92–8762. GILES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 123.

No. 92–8763. PATTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 125.

No. 92–8765. CLARKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 489.

No. 92–8767. REYNOLDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1431.

No. 92–8770. PHILIPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 1241.

No. 92–8779. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1061.

No. 92–8782. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 986 F. 2d 1418.

No. 92–8784. SALAZAR *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 173 Ariz. 399, 844 P. 2d 566.

No. 92–8785. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8793. BARNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 125.

No. 92–8799. GUTIERREZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 986 F. 2d 1419.

No. 92–8801. DONELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1263.

No. 92–8803. MADYUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92–8804. MARTINEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8821. JACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 124.

No. 92–8828. GOMEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 986 F. 2d 1419.

No. 92–8857. MEADOR-BEY *v.* JONES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 989 F. 2d 500.

No. 92–1390. LEE ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 980 F. 2d 1337.

No. 92–7685. RODRIGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 979 F. 2d 1424.

No. 92–1668. WITKOWSKI, WARDEN, ET AL. *v.* GOLDSMITH. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 981 F. 2d 697.

No. 92–1716. TEXAS *v.* CORLEY. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 92–1684. MCI TELECOMMUNICATIONS CORP. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 298 U. S. App. D. C. 230, 978 F. 2d 727.

No. 92–1717. BROWN & ROOT, INC. *v.* MISTICH. Ct. App. La., 4th Cir. Motion of National Ocean Industries Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 609 So. 2d 921.

No. 92–7985. GUY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 172 Wis. 2d 86, 492 N. W. 2d 311.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

In this case, the Wisconsin Supreme Court held that police executing a search warrant for narcotics in a private residence were justified in frisking all persons found on the premises for weapons. Because that holding places the Wisconsin Supreme Court in conflict with other state courts, I would grant certiorari.

While executing a search warrant for cocaine at a residence, Milwaukee police rounded up the five persons found on the premises, handcuffed them, and frisked them for weapons. While patting down petitioner, an officer felt a soft bulge in petitioner's pocket that she believed to be cocaine or marijuana. The officer asked petitioner what it was and petitioner told the officer to "[f]ind out for [her]self." The officer then reached into the pocket and retrieved a baggie containing bindles of cocaine. In upholding petitioner's conviction for possession of cocaine, the Wisconsin Supreme Court held that the patdown search of petitioner was permissible under *Terry* v. *Ohio*, 392 U. S. 1 (1968), and that the seizure of the cocaine was proper under a "plain-touch corollary to the plain-view doctrine." 172 Wis. 2d 86, 101, 492 N. W. 2d 311, 317 (1992).

In holding that police had reasonable suspicion to frisk petitioner, the court below noted that "[a] magistrate had found probable cause to believe that cocaine trafficking was taking place in the residence in which officers found [petitioner]" and that "weapons are often 'tools of the trade' for drug dealers." *Id.*, at 96, 492 N. W. 2d, at 315. Other state courts have upheld patdown searches of persons encountered during the execution of a narcotics search warrant in a private residence on the same rationale. See, *e. g.*, *State* v. *Alamont*, 577 A. 2d 665, 667–668 (R. I. 1990); *State* v. *Zearley*, 444 N. W. 2d 353, 357 (N. D. 1989); *People* v. *Thurman*, 209 Cal. App. 3d 817, 824, 257 Cal. Rptr. 517, 520 (1989). Others, however, have disallowed patdown searches on essentially identical facts, holding that a defendant's "'mere presence' at a private residence being searched pursuant to a search warrant cannot justify a frisk of [the defendant's] person." *State* v. *Broadnax*, 98 Wash. 2d 289, 295, 654 P. 2d 96, 101 (1982); see also *United States* v. *Harvey*, 897 F. 2d 1300, 1304, n. 2 (CA5 1990). Specifically, the courts disagree over whether this Court's

holding in *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), that police could not frisk all persons present in a public tavern while executing a search warrant based merely on their presence there applies where a search warrant for drugs is executed in a private home. The court below distinguished *Ybarra* on the grounds that occupants found in a private residence, unlike those found in a public tavern, are "very likely" to be associated with any illegal narcotics activity on the premises and thus likely to be armed and dangerous. 172 Wis. 2d, at 98, 492 N. W. 2d, at 316; accord, *Alamont*, *supra*, at 668; *Zearley*, *supra*, at 357; *Thurman*, *supra*, at 824–825, 257 Cal. Rptr., at 520–521. The Washington Supreme Court in *Broadnax*, however, rejected this reasoning and held *Ybarra* to be controlling. *Broadnax*, *supra*, at 295, 654 P. 2d, at 101.

In my view, the issue is of significant practical importance to law enforcement officers executing search warrants and to the citizens they encounter while doing so. I would grant certiorari to resolve the constitutional question.

No. 92–8725 (A–890). ZUCKERMAN *v.* UNITED STATES. C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. Reported below: 981 F. 2d 1249.

Rehearing Denied

No. 92–1309. MCFERREN *v.* UNITED STATES, 508 U. S. 906;

No. 92–1532. MARITIME OVERSEAS CORP. ET AL. *v.* HAE WOO YOUN, 508 U. S. 910;

No. 92–1542. TIJERINA *v.* STOWBRIDGE, 508 U. S. 910;

No. 92–7683. DIAZ *v.* CALIFORNIA, 508 U. S. 916;

No. 92–7729. VITANZA *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, 508 U. S. 916;

No. 92–7789. BLAIR *v.* ARMONTROUT, ASSISTANT DIRECTOR/ZONE II, MISSOURI DIVISION OF ADULT INSTITUTIONS, ET AL., 508 U. S. 916;

No. 92–7988. COOPER *v.* KANSAS, 508 U. S. 919;

No. 92–7994. ABATE *v.* IMMIGRATION AND NATURALIZATION SERVICE, 508 U. S. 919;

No. 92–8054. SIMMONS *v.* HENRY FORD HOSPITAL, 508 U. S. 921;

No. 92–8127. MALIK *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY, 508 U. S. 924;

No. 92–8162. JOHNS *v.* DUFNER CATERING CENTER ET AL., 508 U. S. 925;

No. 92–8181. MCGRAW ET AL. *v.* UNITED STATES, 508 U. S. 926;

No. 92–8236. ROBBINS *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 508 U. S. 928; and

No. 92–8266. MARKS *v.* OKLAHOMA TAX COMMISSION, 508 U. S. 943. Petitions for rehearing denied.

JUNE 28, 1993

Certiorari Granted—Vacated and Remanded

No. 91–882. LEWY ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation, ante,* p. 86. Reported below: 242 Va. 322, 410 S. E. 2d 629.

No. 91–1436. SWANSON ET AL. *v.* NORTH CAROLINA ET AL. Sup. Ct N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation, ante,* p. 86. Reported below: 330 N. C. 390, 410 S. E. 2d 490.

No. 91–1473. SHEEHY ET AL. *v.* MONTANA DEPARTMENT OF REVENUE. Sup. Ct. Mont. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation, ante,* p. 86. Reported below: 250 Mont. 437, 820 P. 2d 1257.

No. 91–1697. BASS ET AL. *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Motion of Tax Section, South Carolina Bar, for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation, ante,* p. 86. Reported below: 307 S. C. 113, 414 S. E. 2d 110.

No. 91–1913. OHIO *v.* DEMUTH. Ct. App. Ohio, Erie County. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Dixon, ante,* p. 688.

No. 91–1924. AYUDA, INC., ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari granted, judgment

vacated, and case remanded for further consideration in light of *Reno* v. *Catholic Social Services, Inc.*, *ante*, p. 43. Reported below: 292 U. S. App. D. C. 150, 948 F. 2d 742.

No. 91–2047. NORWEST BANK DULUTH, N. A., ET AL. *v.* MCCLUNG, MINNESOTA COMMISSIONER OF REVENUE, ET AL. Sup. Ct. Minn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation*, *ante*, p. 86. Reported below: 480 N. W. 2d 647.

No. 91–6745. RICHARDSON *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Texas*, *ante*, p. 350. Reported below: 886 S. W. 2d 769.

No. 91–8105. EARHART *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Texas*, *ante*, p. 350. Reported below: 823 S. W. 2d 607.

No. 91–8435. GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Texas*, *ante*, p. 350.

No. 92–335. ALABAMA *v.* LEIGHTON. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Dixon*, *ante*, p. 688. Reported below: 586 So. 2d 308.

No. 92–451. RENO, ATTORNEY GENERAL, ET AL. *v.* PERALES ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reno* v. *Catholic Social Services, Inc.*, *ante*, p. 43. Reported below: 967 F. 2d 798.

No. 92–521. DUFFY ET AL. *v.* WETZLER ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Department of Taxation*, *ante*, p. 86. Reported below: 174 App. Div. 2d 253, 579 N. Y. S. 2d 684.

No. 92–773. RENO, ATTORNEY GENERAL OF THE UNITED STATES *v.* ADULT VIDEO ASSN. ET AL. C. A. 9th Cir. Certiorari

granted, judgment vacated, and case remanded for further consideration in light of *Alexander* v. *United States*, *ante*, p. 544. Reported below: 960 F. 2d 781.

No. 92–849. IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* ZAMBRANO ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reno* v. *Catholic Social Services, Inc.*, *ante*, p. 43. Reported below: 972 F. 2d 1122.

No. 92–1276. REICH *v.* COLLINS ET AL. Sup. Ct. Ga. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harper* v. *Virginia Dept. of Taxation*, *ante*, p. 86. Reported below: 262 Ga. 625, 422 S. E. 2d 846.

No. 92–1522. AMERICAN NATIONAL BANK & TRUST CO. *v.* HANSON ET AL. Sup. Ct. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *TXO Production Corp.* v. *Alliance Resources Corp.*, *ante*, p. 443. Reported below: 844 S. W. 2d 408.

No. 92–5580. LUCAS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Texas*, *ante*, p. 350. Reported below: 834 S. W. 2d 339.

No. 92–7433. HALE *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Department of Justice* v. *Landano*, 508 U. S. 165 (1993). Reported below: 973 F. 2d 894.

No. 92–7567. HAWKINS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Texas*, *ante*, p. 350.

Certiorari Granted—Vacated

No. 92–528. SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL. C. A. 2d Cir. Certiorari granted and judgment of the Court of Appeals vacated as moot. See *United States* v.

Munsingwear, 340 U. S. 36, 39–40 (1950); *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981). Reported below: 969 F. 2d 1326.

Miscellaneous Orders

No. ——. IN RE BURGESS. Motion for reconsideration of denial of admission to the Bar of this Court denied.

No. ——. IN RE BREWSTER. Motion for further consideration of application for admission to the Bar of this Court denied.

No. ——. TROYER ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–909. LEWIS *v.* UNITED STATES. C. A. 1st Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–927 (92–1971). MOORE ET AL. *v.* ESPY, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–1236. IN RE DISBARMENT OF PROTOKOWICZ. Disbarment entered. [For earlier order herein, see 507 U. S. 903.]

No. D–1248. IN RE DISBARMENT OF HAYES. Disbarment entered. [For earlier order herein, see 507 U. S. 982.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. The Solicitor General is invited to file a brief in this case expressing the views of the United States on the Joint Motion for Entry of Stipulated Judgment and Decree. [For earlier order herein, see, *e. g.*, 506 U. S. 996.]

No. 91–1950. AMERICAN DREDGING CO. *v.* MILLER. Sup. Ct. La. [Certiorari granted, 507 U. S. 1028.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–519. JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL. D. C. N. D. Fla. [Probable jurisdiction noted *sub nom. Wetherell* v. *De Grandy*, 507 U. S. 907.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 92–989. TENNESSEE *v.* MIDDLEBROOKS; and TENNESSEE *v.* EVANS. Sup. Ct. Tenn. [Certiorari granted, 507 U. S. 1028.] Motion of Appellate Committee of the California District Attorneys' Association for leave to file a brief as *amicus curiae* granted.

No. 92–1012. SIMPSON PAPER (VERMONT) CO. *v.* DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. Sup. Ct. Vt. Motion of respondent Vermont to strike the supplement denied.

No. 92–1482. WEISS *v.* UNITED STATES; and HERNANDEZ *v.* UNITED STATES. Ct. Mil. App. [Certiorari granted, 508 U. S. 939.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 92–1510. CAVANAUGH, EXECUTIVE DIRECTOR, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, ET AL. *v.* ROLLER. C. A. 4th Cir. [Certiorari granted, 508 U. S. 939.] Motion for appointment of counsel granted, and it is ordered that W. Gaston Fairey, Esq., of Columbia, S. C., be appointed to serve as counsel for respondent in this case.

No. 92–6921. LITEKY ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 508 U. S. 939.] Motion for appointment of counsel granted, and it is ordered that Peter Thompson, Esq., of Minneapolis, Minn., be appointed to serve as counsel for petitioners in this case.

No. 92–7549. SCHIRO *v.* CLARK, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. [Certiorari granted, 508 U. S. 905.] Motion of petitioner to enlarge the record granted.

No. 92–8643. QURESHI *v.* ALEXANDRIA HOSPITAL ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 19, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–8937. IN RE ZIEGLER. Petition for writ of habeas corpus denied.

No. 92–8587. IN RE VIGIL;
No. 92–8599. IN RE BENNY;

No. 92–8649. IN RE DAY; and
No. 92–8710. IN RE ANDERSON. Petitions for writs of mandamus denied.

No. 92–8472. IN RE VEY;
No. 92–8473. IN RE VEY; and
No. 92–8646. IN RE O'LEARY. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–1479. MCDERMOTT, INC. *v.* AMCLYDE ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 979 F. 2d 1068.

No. 92–1662. UNITED STATES *v.* GRANDERSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 969 F. 2d 980.

No. 92–8579. ELDER *v.* HOLLOWAY ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 975 F. 2d 1388.

Certiorari Denied

No. 91–375. PLEDGER, DIRECTOR, DEPARTMENT OF FINANCE AND ADMINISTRATION OF ARKANSAS, ET AL. *v.* BOSNICK ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 306 Ark. 45, 811 S. W. 2d 286.

No. 91–1131. WINTERTHUR REINSURANCE CORPORATION OF AMERICA *v.* CALIFORNIA; and
No. 91–1146. UNIONAMERICA INSURANCE CO. LTD. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 919.

No. 91–5862. BOGGESS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 855 S. W. 2d 645.

No. 91–7399. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 822 S. W. 2d 18.

No. 91–7669. WILKERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1054.

No. 91–8433. GOSCH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 829 S. W. 2d 775.

No. 91–8516. GOSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 826 S. W. 2d 162.

No. 91–8742. JAMES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 91–8768. FULLER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 827 S. W. 2d 919.

No. 92–844. OWENS-CORNING FIBERGLAS CORP. *v.* ADAMS; OWENS-CORNING FIBERGLAS CORP. *v.* BURTON; OWENS-CORNING FIBERGLAS CORP. *v.* CAMPBELL; OWENS-CORNING FIBERGLAS CORP. *v.* CARR; OWENS-CORNING FIBERGLAS CORP. *v.* CHAPMAN; OWENS-CORNING FIBERGLAS CORP. *v.* DALTON; OWENS-CORNING FIBERGLAS CORP. *v.* DARRAH; OWENS-CORNING FIBERGLAS CORP. *v.* DUNN; OWENS-CORNING FIBERGLAS CORP. *v.* ENGLAND; OWENS-CORNING FIBERGLAS CORP. *v.* GABBERT; OWENS-CORNING FIBERGLAS CORP. *v.* HOSCHAR; OWENS-CORNING FIBERGLAS CORP. *v.* JOHNSON; OWENS-CORNING FIBERGLAS CORP. *v.* KIRK; OWENS-CORNING FIBERGLAS CORP. *v.* KITTLE; OWENS-CORNING FIBERGLAS CORP. *v.* LIPSCOMB; OWENS-CORNING FIBERGLAS CORP. *v.* LOTT; OWENS-CORNING FIBERGLAS CORP. *v.* MEHALIC; OWENS-CORNING FIBERGLAS CORP. *v.* ROOT; OWENS-CORNING FIBERGLAS CORP. *v.* ROWE; OWENS-CORNING FIBERGLAS CORP. *v.* SEBERNA; OWENS-CORNING FIBERGLAS CORP. *v.* SHILOT; OWENS-CORNING FIBERGLAS CORP. *v.* BARNES; OWENS-CORNING FIBERGLAS CORP. *v.* CAMPBELL; OWENS-CORNING FIBERGLAS CORP. *v.* FITZSIMMONS; OWENS-CORNING FIBERGLAS CORP. *v.* FRAZIER; OWENS-CORNING FIBERGLAS CORP. *v.* HARRAH; OWENS-CORNING FIBERGLAS CORP. *v.* HEABERLIN; OWENS-CORNING FIBERGLAS CORP. *v.* HUNT; OWENS-CORNING FIBERGLAS CORP. *v.* MANO; OWENS-CORNING FIBERGLAS CORP. *v.* MCCORMICK; OWENS-CORNING FIBERGLAS CORP. *v.* MOORE; OWENS-CORNING FIBERGLAS CORP. *v.* NEIDERT; OWENS-CORNING FIBERGLAS CORP. *v.* SCOTKA; OWENS-CORNING FIBERGLAS CORP. *v.* SISLER; OWENS-CORNING FIBERGLAS CORP. *v.* THORNE; and OWENS-CORNING FIBERGLAS CORP. *v.* TIMBERLAKE. Cir. Ct. Monongalia County, W. Va. Certiorari denied.

No. 92–1366. DECAMP *v.* DOUGLAS COUNTY FRANKLIN GRAND JURY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1047.

No. 92–1376. NICKERSON AMERICAN PLANT BREEDERS INC. *v.* LATHAM SEED CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1493.

No. 92–1453. COLLINS ET AL. *v.* REICH. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 625, 422 S. E. 2d 846.

No. 92–1471. CELOTEX CORP. *v.* POOL ET AL.; and
No. 92–1474. FIBREBOARD CORP. *v.* POOL ET AL. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 813 S. W. 2d 658.

No. 92–1505. COLLAGEN CORP. *v.* KENNEDY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1342.

No. 92–1508. WOODARD ET AL. *v.* SEGHETTI ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 1392.

No. 92–1708. NORTHWESTERN MUTUAL LIFE INSURANCE CO. *v.* DEFENDER INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 989 F. 2d 492.

No. 92–1746. BOSTIC *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 981 F. 2d 965.

No. 92–1754. JACOBSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 232 Ill. App. 3d 1112, 650 N. E. 2d 26.

No. 92–1755. LAMBORNE *v.* HAYNES ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–1756. SEVER ET AL. *v.* FELICE. C. A. 3d Cir. Certiorari denied. Reported below: 985 F. 2d 1221.

No. 92–1760. DECOSTA, EXECUTOR OF THE ESTATE OF DECOSTA, DECEASED *v.* VIACOM INTERNATIONAL. C. A. 1st Cir. Certiorari denied. Reported below: 981 F. 2d 602.

No. 92–1763. VALENTINE SUGARS INC. *v.* DONAU CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 210.

No. 92–1765. CULLEN *v.* HOUSING AUTHORITY OF SACRAMENTO COUNTY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–1773. WALKER *v.* WINDOM ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 612 So. 2d 1167.

No. 92–1775. RAWL SALES & PROCESSING CO. *v.* UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST ET AL.; and

No. 92–1945. PITTSTON CO. ET AL. *v.* UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 299 U. S. App. D. C. 339, 984 F. 2d 469.

No. 92–1776. JOHNSON *v.* LYNCH, DBA FORREST HILLS SHOPPING CENTER, ET AL. Ct. App. Ky. Certiorari denied.

No. 92–1779. CARTER ET AL. *v.* CITY OF ST. LOUIS ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 844 S. W. 2d 529.

No. 92–1780. GEICK *v.* KAY, PRESIDENT, BOARD OF TRUSTEES OF THE VILLAGE OF LAKE ZURICH, ILLINOIS, ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 236 Ill. App. 3d 868, 603 N. E. 2d 121.

No. 92–1781. CASEY ET AL. *v.* NATIONSBANK OF TEXAS, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–1785. IHC HOSPITALS, INC., ET AL. *v.* DECKER. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 433.

No. 92–1787. NEWMAN *v.* VOINOVICH, GOVERNOR OF OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 159.

No. 92–1792. HELINSKI *v.* ROSENBERG. Ct. App. Md. Certiorari denied. Reported below: 328 Md. 664, 616 A. 2d 866.

No. 92–1796. SANDERS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 613 So. 2d 64.

No. 92–1800. LEWIS ET AL. *v.* BABCOCK INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 985 F. 2d 83.

No. 92–1811. MCCULLOM ET AL. *v.* BOARD OF EDUCATION OF THE PRINCETON CITY SCHOOL DISTRICT ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 92–1815. HEFTI ET UX. *v.* MCGRATH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 525.

No. 92–1816. GREER ET UX. *v.* GASTON. Ct. App. S. C. Certiorari denied.

No. 92–1853. RANGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 982 F. 2d 196.

No. 92–1858. SIMPSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 92–1859. KRAWSHUK *v.* HOUSTON ET AL. App. Ct. Conn. Certiorari denied.

No. 92–1875. PARDUE *v.* UNITED STATES;
No. 92–8724. PARDUE *v.* UNITED STATES; and
No. 92–8771. PARDUE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: No. 92–1875, 983 F. 2d 843; No. 92–8724, 983 F. 2d 850; No. 92–8771, 983 F. 2d 835.

No. 92–1876. UNDERWOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 426.

No. 92–5088. HOLLAND *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 962 F. 2d 417.

No. 92–5153. JOINER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 825 S. W. 2d 701.

No. 92–5182. KELLY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 832 S. W. 2d 44.

No. 92–5841. BRIDGE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 767.

No. 92–5846. HARRIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 369.

No. 92–5865. DREW *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 411.

No. 92–6035. DRAUGHON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 831 S. W. 2d 331.

No. 92–6394. CANTU *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 967 F. 2d 1006.

No. 92–6439. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 2d 775.

No. 92–6942. NEWTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–6953. DUNN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–7120. CANTU *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 842 S. W. 2d 667.

No. 92–7213. BONHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–7360. SALDIVAR-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 730.

No. 92–7499. JARVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 720.

No. 92–7530. JACOBS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 843 S. W. 2d 517.

No. 92–7919. BLUE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–7972. RABBANI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 847 S. W. 2d 555.

No. 92–7979. HAMPEL ET VIR *v.* AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 92–8191. FUNKHOUSER *v.* SAFFLE, REGIONAL DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1427.

No. 92–8212. HUNTER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 840 S. W. 2d 850.

No. 92–8318. HARRELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 983 F. 2d 1073.

No. 92–8323. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1078.

No. 92–8344. COOKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 844 S. W. 2d 697.

No. 92–8412. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8455. NANTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 209.

No. 92–8513. SANCHEZ *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–8514. SAPP *v.* BRADY. C. A. 4th Cir. Certiorari denied. Reported below: 991 F. 2d 790.

No. 92–8516. HERNANDEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 842 S. W. 2d 306.

No. 92–8518. GOTCHEY *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1251.

No. 92–8520. HOWE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 92–8521. FARMELANT *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 187 App. Div. 2d 281, 590 N. Y. S. 2d 411.

No. 92–8535. MITCHELL *v.* IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–8538. LEWIS *v.* LYNN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 990 F. 2d 625.

No. 92–8540. RODGERS *v.* TRIGG, SUPERINTENDENT, INDIANA YOUTH CENTER. C. A. 7th Cir. Certiorari denied.

No. 92–8543. KLEINSCHMIDT *v.* UNITED STATES FIDELITY & GUARANTY INSURANCE CO. ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 599 So. 2d 208.

No. 92–8545. JENKINS ET AL. *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 92–8552. TAGGART *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 233 Ill. App. 3d 530, 599 N. E. 2d 501.

No. 92–8555. SLUSHER *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 844 P. 2d 1222.

No. 92–8564. PALMER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 456.

No. 92–8572. BROWNE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 494 N. W. 2d 241.

No. 92–8573. ENDRES *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 986 F. 2d 502.

No. 92–8574. FAIRCHILD *v.* ENDELL, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 979 F. 2d 636.

No. 92–8575. JONES *v.* CITY OF ST. PAUL, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 989 F. 2d 505.

No. 92–8577. HINES *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–8580. HUNT *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 989 F. 2d 499.

No. 92–8584. JEFFERS *v.* CLARK, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 985 F. 2d 563.

No. 92–8585. SULLIVAN *v.* FREEMAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–8586. SNYDER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92-8589. WEST *v.* TRUMAN MEDICAL CENTER WEST, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92-8596. JAMES *v.* IVINS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 989 F. 2d 505.

No. 92-8607. STEEL *v.* STEEL ET AL. C. A. 2d Cir. Certiorari denied.

No. 92-8612. HILLESHIEM *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 172 Wis. 2d 1, 492 N. W. 2d 381.

No. 92-8619. PARKER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 610 So. 2d 1181.

No. 92-8627. LEWIS *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92-8628. MITCHELL *v.* OHIO. Ct. App. Ohio, Licking County. Certiorari denied.

No. 92-8636. JASINSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 489.

No. 92-8640. O'BRIEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 774.

No. 92-8642. PANADERO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 92-8644. MCCLAIN *v.* AETNA CASUALTY & SURETY CO. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92-8647. LEON *v.* CARROLL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 737.

No. 92-8650. WASHINGTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 238 Ill. App. 3d 371, 610 N. E. 2d 88.

No. 92-8659. BASS *v.* BASS. Sup. Ct. N. J. Certiorari denied.

No. 92-8663. HUNT *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 119.

No. 92–8664. IVY *v.* CITY OF MERIDIAN, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1062.

No. 92–8668. CAMACHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 903.

No. 92–8674. MASSENGILL *v.* DORSEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1428.

No. 92–8675. NOBLE *v.* JOHNSON. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 240 Ill. App. 3d 731, 608 N. E. 2d 537.

No. 92–8676. MILLER *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF MONESSEN. C. A. 3d Cir. Certiorari denied.

No. 92–8677. MCCOY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 1162.

No. 92–8681. RICHEY *v.* YARBOROUGH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 991 F. 2d 796.

No. 92–8684. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 987 F. 2d 153.

No. 92–8695. COX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–8698. MUINA *v.* KKK ORGANIZATION OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–8714. MAXWELL *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 29 Conn. App. 704, 618 A. 2d 43.

No. 92–8718. CRAIG *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–8720. CRONEY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 720.

No. 92–8750. CHIA *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 584.

No. 92-8768. MILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92-8790. WARMSLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92-8813. SIMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 993 F. 2d 1548.

No. 92-8815. EDNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92-8816. SPIVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 740.

No. 92-8818. VONGSAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 126.

No. 92-8819. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 988 F. 2d 1210.

No. 92-8820. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 773.

No. 92-8824. GRANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 980.

No. 92-8826. COOK *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 989 F. 2d 1198.

No. 92-8829. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 989 F. 2d 752.

No. 92-8830. TRAINER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 126.

No. 92-8833. SALCIDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 51.

No. 92-8837. MONTGOMERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1264.

No. 92-8838. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1266.

No. 92-8839. RUNNELLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8840. MEDINA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1430.

No. 92–8842. ROMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–8844. PICART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 579.

No. 92–8848. DIAMOND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 879.

No. 92–8852. HATHORN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 848 S. W. 2d 101.

No. 92–8854. CURE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 774.

No. 92–8858. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 984 F. 2d 1139.

No. 92–8859. ROQUEMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 990 F. 2d 1268.

No. 92–8868. SAN-MIGUEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 987 F. 2d 771.

No. 92–8880. ROCCIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 981 F. 2d 587.

No. 92–8881. RYMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92–8882. LADY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1568.

No. 92–8885. HOSTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 774.

No. 92–8898. DENNIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 987 F. 2d 774.

No. 92–8900. RAMSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 579.

No. 92–8901. LOVE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 986 F. 2d 1425.

No. 92–8913. HEARN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 992 F. 2d 1218.

No. 92–361. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GUTIERREZ. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 953 F. 2d 579.

No. 92–1241. OWENS-ILLINOIS, INC. *v.* POOL ET AL. Ct. App. Tex., 6th Dist. Motion of Continental Casualty Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 813 S. W. 2d 658.

No. 92–9100 (A–960). HARRIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. Reported below: 990 F. 2d 185.

No. 93–5005 (A–7). STEVENS *v.* ZANT, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 93–5006 (A–6). STEVENS *v.* ZANT, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 93–5007 (A–8). DUFF-SMITH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 995 F. 2d 545.

Rehearing Denied

No. 91–1030. WITHROW *v.* WILLIAMS, 507 U. S. 680;

No. 92–259. OKLAHOMA TAX COMMISSION *v.* SAC AND FOX NATION, 508 U. S. 114;

No. 92–1512. MONROE AUTO EQUIPMENT CO. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICUL-

TURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY UNIT OF LOCAL 878, 508 U. S. 931;

No. 92–1551. IN RE MCDONALD, 508 U. S. 905;

No. 92–1565. SELTZER *v.* OFFICE OF PERSONNEL MANAGEMENT, 508 U. S. 911;

No. 92–1724. DINOLA *v.* STEWART ET AL., 508 U. S. 961;

No. 92–7249. HOLLY *v.* TRUE, WARDEN, ET AL., 508 U. S. 914;

No. 92–7893. BEAUMONT ET AL. *v.* UNITED STATES, 507 U. S. 1054;

No. 92–7955. VEY *v.* WOLFE, ATTORNEY GENERAL OF PENNSYLVANIA, 508 U. S. 918;

No. 92–7958. HUGHES *v.* BORGERT, WARDEN, 508 U. S. 918;

No. 92–7974. MIX *v.* CITY OF HAZEL PARK ET AL., 508 U. S. 919;

No. 92–8009. MORRISON *v.* ESTELLE, WARDEN, 508 U. S. 920;

No. 92–8092. RAPHLAH *v.* TEXAS, 508 U. S. 922;

No. 92–8103. IN RE HARRIS, 508 U. S. 905;

No. 92–8107. WATTS *v.* MAZURKIEWICZ, WARDEN, ET AL., 508 U. S. 923; and

No. 92–8259. DEMPSEY *v.* HARSHBARGER, ATTORNEY GENERAL OF MASSACHUSETTS, 508 U. S. 943. Petitions for rehearing denied.

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE THOMAS be, and he is hereby, assigned to the Tenth Circuit as Circuit Justice pending further order of the Court.

JUNE 30, 1993

Certiorari Denied

No. 93–5037 (A–9). HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 12, 1993

Dismissal Under Rule 46

No. 92–2011. DUNCAN *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed under this Court's Rule 46. Reported below: 193 Ga. App. 793, 389 S. E. 2d 365.

JULY 21, 1993

Miscellaneous Order. (See No. A–69, *ante*, p. 823.)

Certiorari Denied

No. 93–5249 (A–50). BLAIR *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied.

JULY 22, 1993

Miscellaneous Orders

No. A–856. CLAY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–13 (O. T. 1993). CHOUDHARY *v.* VERMONT. Application for injunctive relief pending appeal, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1246. IN RE DISBARMENT OF SIMRING. Disbarment entered. [For earlier order herein, see 507 U. S. 982.]

No. D–1253. IN RE DISBARMENT OF PERRIN. Disbarment entered. [For earlier order herein, see 507 U. S. 1015.]

No. D–1254. IN RE DISBARMENT OF BODNER. Disbarment entered. [For earlier order herein, see 507 U. S. 1016.]

No. D–1257. IN RE DISBARMENT OF GATES. Disbarment entered. [For earlier order herein, see 507 U. S. 1028.]

No. D–1258. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 508 U. S. 903.]

No. D–1260. IN RE DISBARMENT OF BLACKBURN. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1262. IN RE DISBARMENT OF WARWICK. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1263. IN RE DISBARMENT OF IZZI. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1264. IN RE DISBARMENT OF CLARK. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1265. IN RE DISBARMENT OF ELLSWORTH. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1266. IN RE DISBARMENT OF PARIS. Disbarment entered. [For earlier order herein, see 508 U. S. 904.]

No. D–1270. IN RE DISBARMENT OF GUBBINS. Disbarment entered. [For earlier order herein, see 508 U. S. 936.]

No. D–1277. IN RE DISBARMENT OF GOLDBERG. It is ordered that Robert P. Goldberg, of Honolulu, Haw., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1278. IN RE DISBARMENT OF RAPP. It is ordered that John Joseph Rapp, of Honolulu, Haw., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1279. IN RE DISBARMENT OF PIPKINS. It is ordered that Richard Lloyd Pipkins, of Las Vegas, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1280. IN RE DISBARMENT OF WOOD. It is ordered that George F. Wood, of Sanford, Me., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1281. IN RE DISBARMENT OF BEAR. It is ordered that F. James Bear, of National City, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1282. IN RE DISBARMENT OF KEITHLEY. It is ordered that Richard Ernest Keithley, of Kansas City, Kan., be suspended

from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1283. IN RE DISBARMENT OF COHEN. It is ordered that Jerome David Cohen, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1284. IN RE DISBARMENT OF ROSENBERG. It is ordered that Roger M. Rosenberg, of Mineola, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1285. IN RE DISBARMENT OF SLIFFMAN. It is ordered that Marc Harvey Sliffman, of Wheaton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1286. IN RE DISBARMENT OF NEDER. It is ordered that Ellis Emeen Neder, Jr., of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1287. IN RE DISBARMENT OF HELINGER. It is ordered that James A. Helinger, Jr., of Clearwater, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1288. IN RE DISBARMENT OF CORREA. It is ordered that Dennis D. Correa, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1289. IN RE DISBARMENT OF LASHKOWITZ. It is ordered that Shelley J. Lashkowitz, of Denver, Colo., be suspended from the practice of law in this Court and that a rule issue,

returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

JULY 26, 1993

Miscellaneous Order

No. A–71 (O. T. 1993). BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT *v.* GRUMET ET AL.; and

No. A–72 (O. T. 1993). BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT *v.* GRUMET ET AL. Applications for stay of the judgment of the Court of Appeals of New York, case No. 120, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JULY 28, 1993

Certiorari Denied

No. 93–5381 (A–95). LASHLEY *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. Reported below: 997 F. 2d 512.

JULY 29, 1993

Certiorari Denied

No. 93–5400 (A–99). HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 30, 1993

Miscellaneous Order

No. A–64 (O. T. 1993). DEBOER, AKA BABY GIRL CLAUSEN, BY HER NEXT FRIEND, DARROW *v.* DEBOER ET AL.; and

No. A–65 (O. T. 1993). DEBOER ET AL. *v.* SCHMIDT. Applications for stay, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

This is a case that touches the raw nerves of life's relationships. We have before us, in Jessica, a child of tender years who for her entire life has been nurtured by the DeBoers, a loving couple led to believe through the adoption process and the then-single biological mother's consent, that Jessica was theirs. Now, the biological father appears, marries the mother, and claims paternal status toward Jessica.

The Supreme Court of Iowa has ruled that Jessica must be returned to her biological parents regardless of whether such action would be in her best interests. See *In re B. G. C.*, 496 N. W. 2d 239 (1992). Jessica, through her next friend, filed an action in Michigan state court, claiming that she has a constitutional right to a determination of her best interests in awarding custody. The DeBoers also filed suit, arguing that federal law authorizes the Michigan state court to modify the custody decree issued in Iowa since the Iowa courts did not at all consider Jessica's best interests, an argument supported by a unanimous decision of the Supreme Court of New Jersey. See *E. E. B.* v. *D. A.*, 89 N. J. 595, 446 A. 2d 871 (1982), cert. denied *sub nom. Angle* v. *Bowen*, 459 U. S. 1210 (1983). The Supreme Court of Michigan rejected the New Jersey decision and concluded that federal law requires deference to the custody decree issued in Iowa even if Jessica's best interests are left unconsidered. See *In re Clausen*, 442 Mich. 648, 502 N. W. 2d 649 (1993).

Jessica, through her next friend, asks that we stay the decision of the Supreme Court of Michigan until we have had an opportunity to review the issues presented. While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the Supreme Court of New Jersey and the Supreme Court of Michigan in fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree.

I therefore would grant the application for a stay, pending our careful and thoughtful consideration of the petition for certiorari and its disposition in due course. I dissent.

AUGUST 3, 1993

Miscellaneous Order

No. A–111 (O. T. 1993). SNYDER, WARDEN *v.* DESHIELDS. Application to vacate the stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

AUGUST 4, 1993

Dismissal Under Rule 46

No. 92–8807. NGUYEN *v.* ELLSWORTH ASSOCIATES, INC. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 991 F. 2d 790.

AUGUST 9, 1993

Miscellaneous Orders

No. A–32 (O. T. 1993). NIZNIK *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF ROCHESTER ET AL. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1239. IN RE DISBARMENT OF MATAR. Disbarment entered. [For earlier order herein, see 507 U. S. 957.]

No. D–1274. IN RE DISBARMENT OF KRAEMER. Disbarment entered. [For earlier order herein, see 508 U. S. 970.]

No. D–1290. IN RE DISBARMENT OF LEATHERS. It is ordered that Karl Derwin Leathers, of Durham, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 91–8674. SMITH *v.* UNITED STATES, 508 U. S. 223;

No. 91–8768. FULLER *v.* TEXAS, *ante*, p. 922;

No. 92–466. BROOKE GROUP LTD. *v.* BROWN & WILLIAMSON TOBACCO CORP., *ante*, p. 209;

No. 92–1541. SHERMOEN ET AL. *v.* UNITED STATES ET AL., *ante*, p. 903;

No. 92–1549. RESHARD ET AL. *v.* BRITT ET AL., 508 U. S. 911;

No. 92–1608. BOWMAN ET AL. *v.* CITY OF FRANKLIN, WISCONSIN, ET AL., 508 U. S. 940;

No. 92–1650. CENTURY CENTRE PARTNERS, LTD. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, *ante*, p. 905;

No. 92–1670. FERGUSON *v.* UNION CITY DAILY MESSENGER ET AL., 508 U. S. 961;

No. 92–1671. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* CROWN CORK & SEAL CO., INC., 508 U. S. 972;

No. 92–1705. MALONEY *v.* SALAFIA ET AL., 508 U. S. 951;

No. 92–1731. JOHNSON ET AL. *v.* LOS ANGELES COMMUNITY COLLEGE DISTRICT ET AL., *ante*, p. 906;

No. 92–1748. ESTATE OF BOHN ET AL. *v.* WADDELL, DIRECTOR, DEPARTMENT OF REVENUE OF ARIZONA, ET AL.; and ABBOTT ET AL. *v.* WADDELL, DIRECTOR, DEPARTMENT OF REVENUE OF ARIZONA, ET AL., *ante*, p. 906;

No. 92–1749. ICARD, TRUSTEE, ET AL. *v.* SARASOTA-MANATEE AIRPORT AUTHORITY, *ante*, p. 906;

No. 92–1766. BRICKNER *v.* VOINOVICH, GOVERNOR OF OHIO, ET AL., 508 U. S. 974;

No. 92–1822. GACKENBACH *v.* DEXTER HYSOL CORP., *ante*, p. 907;

No. 92–1886. HUDDLESTON, TENNESSEE COMMISSIONER OF REVENUE, ET AL. *v.* BLOOMINGDALE'S BY MAIL LTD., *ante*, p. 907;

No. 92–5653. JOHNSON *v.* TEXAS, *ante*, p. 350;

No. 92–6494. CARNEY *v.* DEPARTMENT OF VETERANS AFFAIRS, 506 U. S. 1061;

No. 92–6730. SWARTZ *v.* FLORIDA BAR ET AL., 508 U. S. 914;

No. 92–7120. CANTU *v.* TEXAS, *ante*, p. 926;

No. 92–7802. RESNOVER *v.* CARTER, ATTORNEY GENERAL OF INDIANA, ET AL., 508 U. S. 962;

No. 92–7862. HAWTHORNE *v.* VASQUEZ, WARDEN, 507 U. S. 1053;

No. 92–7914. WARD *v.* WHITLEY, WARDEN, 508 U. S. 963;

No. 92–7942. JENKINS *v.* FIRST FIDELITY MORTGAGE CO., 508 U. S. 918;

No. 92–7998. LOGAN *v.* GRAMLEY, WARDEN, 507 U. S. 1042;

No. 92–8038. TAVAKOLI-NOURI *v.* CENTRAL INTELLIGENCE AGENCY, 508 U. S. 942;

No. 92–8061. BANKS *v.* SAN DIEGO, 508 U. S. 921;

No. 92–8062. BANKS *v.* CALIFORNIA, 508 U. S. 921;

No. 92–8063. BANKS *v.* SAN DIEGO, 508 U. S. 921;
No. 92–8094. ANDERS *v.* UNITED STATES, 507 U. S. 1057;
No. 92–8120. BANKS *v.* RYAN ET AL., 508 U. S. 923;
No. 92–8133. INOCELDA *v.* DEPARTMENT OF THE ARMY, 508 U. S. 924;
No. 92–8146. SIMANONOK *v.* SIMANONOK ET AL., 508 U. S. 925;
No. 92–8220. HUGHLEY *v.* TENNESSEE ET AL., 508 U. S. 927;
No. 92–8249. SANDERS *v.* INTERNAL REVENUE SERVICE, 508 U. S. 963;
No. 92–8251. HUGHLEY *v.* UNITED STATES, 508 U. S. 928;
No. 92–8298. HART *v.* ALABAMA, 508 U. S. 953;
No. 92–8301. GILBERT *v.* BAY AREA RAPID TRANSIT DISTRICT, 508 U. S. 963;
No. 92–8314. LUGO *v.* INDEPENDENT MANAGEMENT ASSN. ET AL., 508 U. S. 975;
No. 92–8317. REID *v.* GUDMANSON, WARDEN, ET AL., 508 U. S. 964;
No. 92–8333. IN RE LEUELLYN, 508 U. S. 958;
No. 92–8338. SMITH *v.* CUSTOM MICRO, INC., 508 U. S. 976;
No. 92–8349. MORELAND *v.* TEXAS, 508 U. S. 976;
No. 92–8353. PARRIS *v.* UNITED STATES, 508 U. S. 954;
No. 92–8354. MYER *v.* WEEKS ET AL., 508 U. S. 976;
No. 92–8424. HICKEY ET AL. *v.* BALLINGALL ET AL., 508 U. S. 981;
No. 92–8436. ERWIN *v.* CITY OF ANGELS CAMP ET AL., *ante*, p. 908;
No. 92–8470. IN RE ZIEBARTH, 508 U. S. 938;
No. 92–8490. BANKS *v.* KCTV–5 ET AL., 508 U. S. 978;
No. 92–8537. NKOP *v.* VAN RUNKLE ET AL., 508 U. S. 978;
No. 92–8563. ROCHEVILLE *v.* SOUTH CAROLINA, 508 U. S. 978;
No. 92–8588. IN RE DIVITO, *ante*, p. 902;
No. 92–8589. WEST *v.* TRUMAN MEDICAL CENTER WEST, INC., ET AL., *ante*, p. 929;
No. 92–8615. CLARK *v.* GOVERNMENT OF THE VIRGIN ISLANDS, *ante*, p. 910;
No. 92–8634. VELASQUEZ *v.* UNITED STATES, 508 U. S. 979;
No. 92–8646. IN RE O'LEARY, *ante*, p. 921;
No. 92–8683. BLACK *v.* KIRKPATRICK ET AL., *ante*, p. 911;
No. 92–8716. SEATON *v.* JABE, WARDEN, *ante*, p. 911; and
No. 92–8725. ZUCKERMAN *v.* UNITED STATES, *ante*, p. 915. Petitions for rehearing denied.

AUGUST 10, 1993

Dismissals Under Rule 46

No. 92–1900. SAMUELSON ET AL. *v.* WOLFF & MUNIER, INC., ET AL. Ct. App. Tenn. Certiorari dismissed under this Court's Rule 46.1.

No. 92–1214. MILLIGAN-JENSEN *v.* MICHIGAN TECHNOLOGICAL UNIVERSITY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 903.] Writ of certiorari dismissed under this Court's Rule 46.1.

AUGUST 17, 1993

Dismissal Under Rule 46

No. 92–1646. FLYNN *v.* UNITED STATES [among other cases under this Court's Rule 12.2]. Ct. Mil. App. Certiorari dismissed as to petitioner Everett D. Flynn under this Court's Rule 46.1. Reported below: 37 M. J. 271.

AUGUST 20, 1993

Certiorari Denied

No. 93–5657 (A–170). KELLY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE GINSBURG took no part in the consideration or decision of this application and this petition.

AUGUST 24, 1993

Certiorari Dismissed

No. 93–5702 (A–175). DUROCHER *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Certiorari dismissed. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE GINSBURG took no part in the consideration or decision of this motion, petition, and application. Reported below: 623 So. 2d 482.

No. 93–5715 (A–187). MINERVA, CAPITAL COLLATERAL REPRESENTATIVE, ET AL., AS NEXT FRIENDS TO DUROCHER *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by Michael Durocher granted. Certiorari dismissed. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE GINSBURG took no part in the consideration or decision of this motion, petition, and application. Reported below: 4 F. 3d 938.

AUGUST 26, 1993

Miscellaneous Orders

No. D–1275. IN RE DISBARMENT OF SEGAL. Disbarment entered. [For earlier order herein, see 508 U. S. 970.]

No. D–1291. IN RE DISBARMENT OF KILPATRICK. It is ordered that Donald Epperson Kilpatrick, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1292. IN RE DISBARMENT OF ROBINSON. It is ordered that John M. Robinson, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1293. IN RE DISBARMENT OF DAMIANI. It is ordered that Richard A. Damiani, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1294. IN RE DISBARMENT OF SPIES. It is ordered that Diane Wilp Spies, of Sherwood, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1295. IN RE DISBARMENT OF KANALEY. It is ordered that John Collins Kanaley, of Syracuse, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1296. IN RE DISBARMENT OF HOHENSTEIN. It is ordered that Kurt A. Hohenstein, of South Sioux City, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1297. IN RE DISBARMENT OF SMITH. It is ordered that Arthur Allan Smith, of Dearborn, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1298. IN RE DISBARMENT OF ROONEY. It is ordered that John P. Rooney, Jr., of Chappaqua, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 91–375. PLEDGER, DIRECTOR, DEPARTMENT OF FINANCE AND ADMINISTRATION OF ARKANSAS, ET AL. *v.* BOSNICK ET AL., *ante*, p. 921;

No. 92–1680. SORO, DBA CITICORP MORTGAGE CO., INC. *v.* CITICORP, 508 U. S. 961;

No. 92–6035. DRAUGHON *v.* TEXAS, *ante*, p. 926;

No. 92–6942. NEWTON *v.* TEXAS, *ante*, p. 926;

No. 92–7979. HAMPEL ET VIR *v.* AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO ET AL., *ante*, p. 926;

No. 92–8002. MILLER *v.* LEE, ATTORNEY GENERAL OF NORTH CAROLINA, 508 U. S. 919;

No. 92–8289. MITCHELL *v.* UNITED STATES, 508 U. S. 953;

No. 92–8315. MCLEOD *v.* MCLEOD ET AL., 508 U. S. 954;

No. 92–8540. RODGERS *v.* TRIGG, SUPERINTENDENT, INDIANA YOUTH CENTER, *ante*, p. 927;

No. 92–8552. TAGGART *v.* ILLINOIS, *ante*, p. 928;

No. 92–8574. FAIRCHILD *v.* ENDELL, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 928;

No. 92–8575. JONES *v.* CITY OF ST. PAUL, MINNESOTA, ET AL., *ante*, p. 928;

No. 92–8599. IN RE BENNY, *ante*, p. 920;

No. 92–8603. CARTER *v.* KEESEE ET AL., *ante*, p. 910;

No. 92–8604. CRITES *v.* KAISER ALUMINUM & CHEMICAL CORP. ET AL., *ante*, p. 910;

No. 92–8676. MILLER *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF MONESSEN, *ante*, p. 930;

No. 92–8698. MUINA *v.* KKK ORGANIZATION OF AMERICA ET AL., *ante*, p. 930;

No. 92–8852. HATHORN *v.* TEXAS, *ante*, p. 932; and

No. 92–8880. ROCCIO *v.* UNITED STATES, *ante*, p. 932. Petitions for rehearing denied. JUSTICE GINSBURG took no part in the consideration or decision of these petitions.

No. 92–7367. NELSON *v.* FORMAN, 507 U. S. 977. Motion for leave to file petition for rehearing denied. JUSTICE GINSBURG took no part in the consideration or decision of this motion.

No. 92–8543. KLEINSCHMIDT *v.* UNITED STATES FIDELITY & GUARANTY INSURANCE CO. ET AL., *ante*, p. 928. Motion for clarification denied. Petition for rehearing denied. JUSTICE GINSBURG took no part in the consideration or decision of this motion and this petition.

AUGUST 30, 1993

Miscellaneous Order

No. A–195 (O. T. 1993). DESHIELDS *v.* SNYDER, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. JUSTICE GINSBURG took no part in the consideration or decision of this application.

Certiorari Denied

No. 93–5756 (A–196). WILKERSON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE GINSBURG took no part in the consideration or decision of this application and this petition.

AUGUST 31, 1993

Miscellaneous Order

No. A–174 (O. T. 1993). BEAVERS *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency

executed by petitioner denied. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE GINSBURG took no part in the consideration or decision of this motion and this application.

SEPTEMBER 1, 1993

Miscellaneous Order

No. A–153 (O. T. 1993). STASSIS *v.* HARTMAN ET AL., BY THEIR NEXT FRIEND, HARTMAN. Ct. App. Iowa. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

Certiorari Denied

No. 93–5361 (A–194). JAMES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to file supplemental petition for certiorari denied. Certiorari denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 987 F. 2d 1116.

SEPTEMBER 2, 1993

Certiorari Denied

No. 93–5845 (A–214). JAMES *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 93–5361. JAMES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante* this page. Petition for rehearing denied.

SEPTEMBER 10, 1993

Miscellaneous Orders

No. A–210 (O. T. 1993). WILLIAMS *v.* UNITED STATES. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–223 (O. T. 1993). TORRES-SIERRA *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied.

SEPTEMBER 24, 1993

Miscellaneous Orders

No. D–1271. IN RE DISBARMENT OF BAILEY. Disbarment entered. [For earlier order herein, see 508 U. S. 937.]

No. D–1272. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 508 U. S. 970.]

No. D–1276. IN RE DISBARMENT OF TEEVENS. Disbarment entered. [For earlier order herein, see 508 U. S. 970.]

No. D–1277. IN RE DISBARMENT OF GOLDBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1280. IN RE DISBARMENT OF WOOD. Disbarment entered. [For earlier order herein, see *ante*, p. 936.]

No. D–1284. IN RE DISBARMENT OF ROSENBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1285. IN RE DISBARMENT OF SLIFFMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1287. IN RE DISBARMENT OF HELINGER. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1289. IN RE DISBARMENT OF LASHKOWITZ. Disbarment entered. [For earlier order herein, see *ante*, p. 937.]

No. D–1299. IN RE DISBARMENT OF MATTHEWS. It is ordered that John S. Matthews, of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1300. IN RE DISBARMENT OF STROMER. It is ordered that Peter R. Stromer, of San Jose, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1301. IN RE DISBARMENT OF POHLMANN. It is ordered that John Milton Pohlmann, of Lafayette, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1302. IN RE DISBARMENT OF WILLIS. It is ordered that Linda Antionette Willis, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1303. IN RE DISBARMENT OF BLAKE. It is ordered that Michael Joseph Blake, of Dearborn Heights, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1304. IN RE DISBARMENT OF KUMMER. It is ordered that Thomas L. Kummer, of Reno, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1305. IN RE DISBARMENT OF THRASHER. It is ordered that Louis Michael Thrasher, of Lincoln, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1306. IN RE DISBARMENT OF ROGERS. It is ordered that John I. Rogers III, of Bennettsville, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1307. IN RE DISBARMENT OF SHENBERG. It is ordered that Harvey N. Shenberg, of South Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1308. IN RE DISBARMENT OF GOODHART. It is ordered that David Goodhart, of Miami, Fla., be suspended from the prac-

tice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1309. IN RE DISBARMENT OF SHANK. It is ordered that John E. Shank, of Cross Lanes, W. Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1310. IN RE DISBARMENT OF ZWEIBON. It is ordered that Bertram Zweibon, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1311. IN RE DISBARMENT OF GHOBASHY. It is ordered that Omar Z. Ghobashy, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1312. IN RE DISBARMENT OF RABINOWITZ. It is ordered that Jacob Rabinowitz, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1313. IN RE DISBARMENT OF RUBIN. It is ordered that Leonard Howard Rubin, of Tarrytown, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1314. IN RE DISBARMENT OF BROWN. It is ordered that Seymour Brown, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–74. DEPARTMENT OF REVENUE OF OREGON *v.* ACF INDUSTRIES, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 508 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–854. CENTRAL BANK OF DENVER, N. A. *v.* FIRST INTERSTATE BANK OF DENVER, N. A., ET AL. C. A. 10th Cir. [Certiorari granted, 508 U. S. 959.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–1239. J. E. B. *v.* ALABAMA EX REL. T. B. Ct. Civ. App. Ala. [Certiorari granted, 508 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–97. NORTHWEST AIRLINES, INC., ET AL. *v.* COUNTY OF KENT, MICHIGAN, ET AL. C. A. 6th Cir. [Certiorari granted, 508 U. S. 959.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 92–780. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* SCHEIDLER ET AL. C. A. 7th Cir. [Certiorari granted, 508 U. S. 971.] Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest to allow counsel to represent children unborn and born alive denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent Monica Migliorino for divided argument and for additional time for oral argument denied.

No. 92–1223. UNITED STATES DEPARTMENT OF DEFENSE ET AL. *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 5th Cir. [Certiorari granted, 507 U. S. 1003.] Motion of respondent American Federation of Government Employees, AFL–CIO, for leave to file motion for divided argument and for divided argument denied.

No. 92–1370. BFP *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSN., ET AL. C. A. 9th Cir. [Certiorari granted, 508 U. S. 938.] Motion of respondents Paul Osborne et al. for divided argument granted.

No. 92–1500. CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. *v.* BOHLEN. C. A. 8th Cir. [Certiorari granted, 508 U. S. 971.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae*

granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92-1639. CITY OF CHICAGO ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 903.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 92-6281. HAGEN *v.* UTAH. Sup. Ct. Utah. [Certiorari granted, 507 U. S. 1028.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 92-8579. ELDER *v.* HOLLOWAY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 921.] Motion of American Bar Association for leave to file a brief as *amicus curiae* granted.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period from September 27, 1993, through June 10, 1994, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

SEPTEMBER 28, 1993

Probable Jurisdiction Noted

No. 93-44. TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Brief of appellants is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 819 F. Supp. 32.

Certiorari Granted

No. 93–70. OREGON WASTE SYSTEMS, INC., ET AL. *v.* DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON ET AL.; and

No. 93–108. COLUMBIA RESOURCE CO. *v.* ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON. Sup. Ct. Ore. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 316 Ore. 99, 849 P. 2d 500.

No. 93–144. DEPARTMENT OF REVENUE OF MONTANA *v.* KURTH RANCH ET AL. C. A. 9th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 986 F. 2d 1308.

No. 93–180. BOCA GRANDE CLUB, INC. *v.* FLORIDA POWER & LIGHT CO., INC. C. A. 11th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 990 F. 2d 606.

No. 92–8556. NICHOLS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioner is to be filed with the Clerk and served

upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 979 F. 2d 402.

No. 92–8894. VICTOR *v.* NEBRASKA. Sup. Ct. Neb. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 3 presented by the petition. Case consolidated with No. 92–9049, *Sandoval* v. *California*, immediately *infra*, and a total of 90 minutes allotted for oral argument. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 242 Neb. 306, 494 N. W. 2d 565.

No. 92–9049. SANDOVAL *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Case consolidated with No. 92–8894, *Victor* v. *Nebraska*, immediately *supra*, and a total of 90 minutes allotted for oral argument. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. This Court's Rule 29 does not apply. Reported below: 4 Cal. 4th 155, 841 P. 2d 862.

SEPTEMBER 29, 1993

Dismissals Under Rule 46

No. 93–213. E–Z MART STORES, INC. *v.* XEROX CREDIT CORP. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 990 F. 2d 1252.

• No. 93–5055. CASTILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 990 F. 2d 1251.

OCTOBER 1, 1993

Dismissal Under Rule 46

No. 93–5501. LIDY *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 988 F. 2d 1209.

Miscellaneous Order. (For the Court's order making allotment of Justices, see *ante*, p. VI.)

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 955 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

DEBOER, AKA BABY GIRL CLAUSEN, BY HER NEXT FRIEND, DARROW *v.* DEBOER ET AL.

ON APPLICATION FOR STAY

No. A–64. Decided July 26, 1993*

Applications to stay enforcement of a Michigan Supreme Court order directing applicant DeBoers to deliver applicant child to her natural parents in Iowa are denied. There is neither a reasonable probability that the Court will grant certiorari nor a fair prospect that, if it did so, it would conclude that the decision below is erroneous. Determinations made by the Iowa Supreme Court and Michigan Court of Appeals—that the DeBoers were not entitled to adopt the child because her biological father's parental rights had not been terminated—control this proceeding's ultimate outcome. Iowa law, Michigan law, and federal law do not authorize unrelated persons to retain custody of a child simply because they may be better able to provide for her future and education. There is no valid federal objection to the conduct or outcome of the Iowa court proceedings. When the DeBoers sought to modify the Iowa Supreme Court's decision in the Michigan courts, rather than seeking review of the decision, the Michigan Supreme Court correctly concluded that Michigan courts are obligated to give effect to the Iowa proceedings.

JUSTICE STEVENS, Circuit Justice.

Applicants in No. A–65 are residents of Washtenaw County, Michigan. On July 2, 1993, the Michigan Supreme Court entered an order requiring them to comply with custody orders that had previously been entered by the Michigan Court of Appeals and by the Iowa state courts which had directed them to deliver a child to its natural parents in Iowa. They have filed an application with me in my capacity

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*Together with No. A–65, *DeBoer* v. *Schmidt*, also on application for stay.

as Circuit Justice for the Sixth Circuit for a stay of enforcement of that order. Applicant in No. A–64 is the child represented by her "next friend," who seeks the same relief. Because I am convinced that there is neither a reasonable probability that the Court will grant certiorari nor a fair prospect that, if it did so, it would conclude that the decision below is erroneous, I have decided to deny the applications.

Respondents are the natural parents of Jessica Clausen, who was born in Iowa on February 8, 1991. When the child was 17 days old, applicants filed a petition for adoption in the Iowa courts. In the ensuing proceedings, the Iowa courts determined that the parental rights of the child's biological father had not been terminated in accordance with Iowa law and that therefore applicants were not entitled to adopt the child. For reasons that have been stated at length in opinions of the Iowa Supreme Court, the Michigan Court of Appeals, and the Michigan Supreme Court, those determinations control the ultimate outcome of this proceeding. Applicants' claim that Jessica's best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they were not entitled to adopt her. Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply by deciding another home offers more advantages." *In re B. G. C.*, 496 N. W. 2d 239, 241 (1992) (internal quotation marks and citation omitted).

My examination of the opinions in the litigation persuades me that there is no valid federal objection to the conduct or the outcome of the proceedings in the Iowa courts. Indeed, although applicants applied to JUSTICE BLACKMUN in his capacity as Justice for the Eighth Circuit for a stay of enforce-

ment of the judgment entered by the Iowa Supreme Court on September 23, 1992, they did not seek review of that judgment after he had denied the stay application. Rather than comply with the Iowa judgment, applicants sought a modification of that judgment in the Michigan courts. In my opinion, the Michigan Supreme Court correctly concluded that the Michigan courts are obligated to give effect to the Iowa proceedings. The carefully crafted opinion of the Michigan Supreme Court contains a comprehensive and thoughtful explanation of the governing rules of law. Accordingly, the stay applications will be denied.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1990, 1991 AND 1992

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1990	1991	1992	1990	1991	1992	1990	1991	1992	1990	1991	1992
Number of cases on dockets	14	12	12	2,351	2,451	2,441	3,951	4,307	4,792	6,516	6,770	7,245
Number disposed of during term	3	1	1	1,986	2,072	2,099	3,423	3,755	4,256	5,412	5,828	6,356
Number remaining on dockets	11	11	11	365	369	342	528	552	536	904	942	889

	TERMS		
	1990	1991	1992
Cases argued during term	125	127	116
Number disposed of by full opinions	121	120	111
Number disposed of by per curiam opinions	4	3	4*
Number set for reargument	0	4	0
Cases granted review this term	141	120	100
Cases reviewed and decided without oral argument	109	75	109
Total cases to be available for argument at outset of following term	70	66	46

*Does not include No. 91–2086, dismissed per Rule 46, April 12, 1993.

JUNE 28, 1993

THE INDEX AND/OR TABLE OF CONTENTS HAS BEEN REMOVED AND PHOTOGRAPHED SEPARATELY WITHIN THIS VOLUME YEAR.

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